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TANKS IN THE STREETS: SUVs, DESIGN DEFECTS, AND ULTRAHAZARDOUS STRICT LIABILITY

KEVIN CASE*

INTRODUCTION

Sport Utility Vehicles, or “SUVs”, are among the most dangerous products ever placed in the hands of American consumers.¹ These vehicles have been killing their drivers and passengers in rollover crashes for years.² However, there is a growing awareness of the lethal injuries and catastrophic damage that SUVs cause to other vehicles and their occupants.³ When an SUV crashes into a passenger car, the occupants of the car are much more likely to be killed than the occupants of the SUV.⁴ This is due to the particular design of SUVs. SUVs ride higher than cars, with bumpers and frame rails that ride up over a car’s frame in a collision, bypassing the car’s built-in energy-absorbing protections.⁵ SUVs also have stiffer frames than passenger cars, allowing the SUV to transfer crash energy to the car instead of sharing the energy equally.⁶ In addition, the sheer mass of SUVs, particularly the latest “behemoth” SUVs such as the Hummer and the new

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1. See generally KEITH BRADSHER, HIGH AND MIGHTY: THE DANGEROUS RISE OF THE SUV (2003) [hereinafter BRADSHER, HIGH AND MIGHTY]; Howard Latin & Bobby Kasolas, *Bad Designs, Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B.U. L. Rev. 1161, 1161 (2002) [hereinafter Latin, *Bad Designs*] (concluding that SUVs “are probably the most dangerous products (other than tobacco and alcohol) in widespread use in the United States”).

2. U.S. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., CHARACTERISTICS OF FATAL ROLLOVER CRASHES 1–2 (2002) [hereinafter NHTSA, ROLLOVER CRASHES].

3. Danny Hakim, *A Regulator Takes Aim at Hazards of S.U.V.’s*, N.Y. TIMES, Dec. 22, 2002, § 3, at 1 [hereinafter Hakim, *Regulator Takes Aim*].

4. See U.S. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., INITIATIVES TO ADDRESS VEHICLE COMPATIBILITY 14–16 (2003) [hereinafter NHTSA, VEHICLE COMPATIBILITY].

5. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 85–87; Malcolm Gladwell, *Big and Bad: How the S.U.V. Ran Over Automotive Safety*, THE NEW YORKER, Jan. 12, 2004, at 28 [hereinafter Gladwell, *Big and Bad*].

6. HAMPTON C. GABLER & WILLIAM T. HOLLOWELL, U.S. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., THE AGGRESSIVITY OF LIGHT TRUCKS AND VANS IN TRAFFIC CRASHES [hereinafter GABLER & HOLLOWELL, AGGRESSIVITY], <http://www-nrd.nhtsa.dot.gov/departments/nrd-11/aggressivity/980908/980908.html> (last visited Aug. 5, 2005).

International CTX,⁷ will both knock a car backwards in an accident and crush it.⁸ The effect is particularly gruesome in side impact crashes, where an SUV overrides a car's door sill and thrusts directly into the passenger compartment.⁹

SUVs are also lethal to pedestrians.¹⁰ Unlike a car, which will flip a pedestrian up onto its relatively soft hood, an SUV will strike a pedestrian at head or chest level, knocking her down and often running her over.¹¹ Children are especially at risk, since the massive front ends of SUVs and their raised hoods will strike a child in the head upon impact.¹² SUVs also kill children with more frequency when backing up, due to extensive "blind spots" that limit the range of vision in the rear and side mirrors of SUVs.¹³

One possible solution to these extraordinary risks would be to litigate the dangerous features of SUVs as "design defects."¹⁴ Most litigation regarding SUVs has focused on rollovers, where the plaintiff is either the driver or passenger of the SUV.¹⁵ Only one, unpublished decision has directly addressed the issue of SUV-car collisions. In *De Veer v. Land Rover*, a Range Rover SUV smashed into the driver's side of the plaintiff's Saab, leaving her with serious head injuries.¹⁶ She sued Land Rover, alleging that her injuries were caused by the Range Rover's unreasonably dangerous design.¹⁷ However, the California appellate court upheld summary judgment in favor of Land Rover.¹⁸ The court held that Land Rover owed no duty of care to the occupants of other vehicles, where the alleged defect did

7. Danny Hakim, *New Way for Stars to Keep Truckin'*, N.Y. TIMES, Jan. 29, 2005, at B9 [hereinafter Hakim, *Stars*].

8. *Crash Compatibility: How Vehicle Type, Weight Affect Outcomes*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Feb. 14, 1998, at 8 [hereinafter IIHS, *Vehicle Weight*].

9. *Id.* at 9.

10. MARC STARNES & ANDERS LONGTHORNE, U.S. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., CHILD PEDESTRIAN FATALITY RATES BY STRIKING VEHICLE BODY TYPE: A COMPARISON OF PASSENGER CARS, SPORT UTILITY VEHICLES, PICKUPS, AND VANS 3 (2003) [hereinafter NHTSA, CHILD PEDESTRIAN], available at http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rnotes/2003/809-640/RN_Ped_Fatal.pdf.

11. BRADSHAW, HIGH AND MIGHTY, *supra* note 1, at 233.

12. *Id.*; NHTSA, CHILD PEDESTRIAN, *supra* note 10, at 3.

13. Paul Hampel, *Vehicles' Blind Spots Contribute to Child Fatalities, Group Says*, CHI. TRIBUNE, Jan. 25, 2004, § 12, at 1 [hereinafter Hampel, *Blind Spots*].

14. *See generally* Latin, *Bad Designs*, *supra* note 1.

15. *See, e.g.*, Clay v. Ford Motor Co., 215 F.3d 663 (6th. Cir. 2000); Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. Ct. App. 1999).

16. *De Veer v. Land Rover N. Am., Inc.*, No. B141538, 2001 WL 34354946, *1 (Cal. Ct. App. Aug. 14, 2001).

17. *Id.* at *1.

18. *Id.*

not cause the initial collision, but merely enhanced the damage and injury resulting from the collision.¹⁹

De Veer illustrates one hurdle that the occupant of a vehicle struck by an SUV might have to overcome before reaching any determination of the reasonableness of SUV design. The plaintiff would have to convince a court to merge two doctrines: the enhanced injury, or “crashworthiness” doctrine, and the doctrine of liability to bystanders or other non-users of a product.²⁰ Under the enhanced injury doctrine, a manufacturer is liable to the user of a product for enhanced injuries resulting from a design defect, even if that defect was not the cause of the initial accident.²¹ Under the bystander liability doctrine, a manufacturer may be liable to non-users of a product for injury caused by a design defect.²² In an SUV-car collision, therefore, a court must agree that an SUV manufacturer owes a duty to occupants of other vehicles—not just occupants of the SUV—for injuries that are enhanced by the design of the SUV, even when that design was not the initial cause of the collision.

Although the *De Veer* court was unwilling to extend the enhanced injury rule to non-users, other courts have not hesitated to do so. In context of car-motorcycle collisions, two federal circuit courts of appeal in the 1970s held automobile manufacturers liable for enhanced injuries, even though the cars’ defective designs did not cause the accidents.²³ Thus, there is precedent in similar if not identical contexts for allowing SUV collision victims to sue an SUV manufacturer. Perhaps realizing this, SUV manufacturers have begun settling crash compatibility suits, some for millions of dollars.²⁴

Once the plaintiff establishes that the SUV manufacturer owes her a duty, the next step in the design defect approach would be a risk-utility analysis of the allegedly defective design.²⁵ Such an analysis would balance SUV risks against the utility or benefits of SUV design, in light of alternative design possibilities.²⁶ The utility of SUVs is marginal at best. Many consumers buy SUVs because they believe that SUVs are safer than

19. *Id.* at *5.

20. See RESTATEMENT (SECOND) OF TORTS § 395 (1965) (bystander liability); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 16 (1998) (enhanced injury rule).

21. See *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 497 (8th Cir. 1968).

22. See *Elmore v. Am. Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969).

23. See *Passwaters v. Gen. Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972) (applying Iowa law); *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976).

24. Danny Hakim & Norm Alster, *Lawsuits: This Year’s Model*, N.Y. TIMES, May 30, 2004, at C1 [hereinafter Hakim & Alster, *Lawsuits*].

25. See Latin, *Bad Designs*, *supra* note 1, at 1184–85.

26. *Id.*

cars.²⁷ However, the opposite is true: SUV occupants are more likely to die in their vehicle than car occupants, due to rollover dangers and increased injuries when hitting fixed objects.²⁸ Likewise, any alleged benefits from the “off-road” capabilities of SUVs are of little consequence because few SUV owners ever take their vehicles off-road.²⁹ Almost all SUV drivers use their SUV in the same way they would use a car.³⁰ Nor does an SUV’s extra space offer any real benefit to large families because the same amount of space, if not more, is available in a much safer minivan.³¹ In reality, SUV ownership offers nothing more than a feeling of power, control, protection, freedom, and intimidation of others.³² The feeling is purely personal to the driver. Weighed against the substantial risks SUVs create to others, this utility is negligible.

A second approach to challenging the dangers of SUV design would be to allege that driving a large SUV is an ultrahazardous or abnormally dangerous activity, subject to strict liability for any injuries caused to non-occupants.³³ The doctrine of ultrahazardous strict liability,³⁴ while widely accepted, has been primarily limited to a narrow range of activities, such as blasting operations and toxic waste storage.³⁵ The doctrine has not been expanded to include automobiles, despite the significant risk of serious injury to others from a driver’s loss of control, because both Restatements of Torts (First and Second) have excluded the doctrine’s application to activities of “common usage.”³⁶ However, courts have not always agreed with the Restatements; in fact, some courts have explicitly or implicitly rejected Restatement constraints when imposing strict liability for ultrahaz-

27. John Cloud, *Why the SUV is All the Rage*, TIME, Feb. 24, 2003, at 34, 36 [hereinafter Cloud, *SUV Rage*].

28. See U.S. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., 2003 ANNUAL ASSESSMENT: MOTOR VEHICLE TRAFFIC CRASH FATALITY COUNTS AND INJURY ESTIMATES FOR 2003, at 49 (2003) [hereinafter NHTSA, 2003 ASSESSMENT], available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/PPT/2003AARRelease.pdf>; see also BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 169.

29. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 113.

30. *Id.*

31. Peter J. Cooper, *Attack of the Four-Wheeled Giants*, USA TODAY, Mar. 2004, at 66, 68 [hereinafter Cooper, *Attack*].

32. See BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 95–108; Keith Bradsher, *Domination, Submission and the Chevy Suburban*, N.Y. TIMES, Mar. 23, 1997, § 4, at 2 [hereinafter Bradsher, *Domination*].

33. See RESTATEMENT (SECOND) OF TORTS § 519–20 (1977).

34. The Restatement (First) refers to “ultrahazardous” activity, see RESTATEMENT (FIRST) OF TORTS § 519 (1938), while the Restatement (Second) uses the term “abnormally dangerous,” see RESTATEMENT (SECOND) OF TORTS § 519–20 (1977). For purposes of this Note, the terms will be used interchangeably, unless otherwise noted.

35. See Dep’t of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983) (toxic waste); Asheville Const. Co. v. S. Ry. Co., 19 F.2d 32, 34 (4th Cir. 1927) (blasting).

36. See RESTATEMENT (FIRST) OF TORTS § 520(b) (1938); RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977).

ardous activities.³⁷ Rather than applying a strict legal test, these courts have chosen to adhere to the basic principles underlying the doctrine. In particular, two broad themes emerge: first, a recognition of the extraordinary inherent risks of certain activities; and second, an overarching concern of fairness to innocent victims injured as a result of those activities.³⁸ Moreover, the “common usage” of SUVs should not be taken for granted. The Restatement (Second), after stating that cars are too common to be subject to strict liability, adds, “On the other hand, the operation of a *tank or any other motor vehicle of such size and weight* as to be unusually difficult to control safely . . . may be abnormally dangerous.”³⁹ Today’s SUVs, with their massive size, weight, rollover tendencies, and in the case of the Hummer, military origin,⁴⁰ fit this description alarmingly well.

This Note will explore two legal arguments, introduced above, that can be made by nonoccupant plaintiffs who are injured as a result of the dangerous features of SUVs. Part I will describe the extraordinary risks posed by SUVs to their own occupants, occupants of other vehicles, and pedestrians. Part II will discuss the possibility of litigating SUV design as a design defect, concluding first that SUV manufacturers indeed owe a duty of care to non-users of their products for enhanced injuries caused by their vehicles, and second that SUVs fail the risk-utility analysis that is central to a determination of design reasonableness. Part III will discuss whether driving an SUV, especially a “behemoth” SUV like a Hummer, can be considered an ultrahazardous activity. Part III concludes that SUVs can be deemed ultrahazardous under both the Restatement factors and the approach of courts that adhere to traditional principles of ultrahazardous strict liability.

I. THE EXTRAORDINARY DANGERS OF SUVs

Light trucks (LTVs)—a category that includes SUVs, pickups, and minivans—have become increasingly popular in the United States.⁴¹ In

37. See, e.g., *Koos v. Roth*, 652 P.2d 1255, 1261–63 (Or. 1982) (rejecting “value to the community” and “appropriateness of location” factors); *Yukon Equip. v. Fireman’s Fund Ins. Co.*, 585 P.2d 1206, 1211 (Alaska 1978) (“[W]e do not believe the Restatement (Second) approach should be used.”); *Siegler v. Kuhlman*, 502 P.2d 1181, 1186–87 (Wash. 1972) (giving little or no weight to factors of “common usage,” “appropriateness to the location,” or “value to the community”).

38. See *Exner v. Sherman Power Const. Co.*, 54 F.2d 510, 514 (2d Cir. 1931).

39. RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977) (emphasis added).

40. See BRADSHAW, HIGH AND MIGHTY, *supra* note 1, at 363–64.

41. In 2003, there were roughly 79 million LTVs registered in the U.S., comprising 36 % of all registered passenger vehicles. See Jeffrey W. Runge, M.D., Adm’r., U.S. Nat’l Highway Traffic Safety Admin., Before The Committee On Commerce, Science, And Transportation, United States Senate, (Feb. 26, 2003) [hereinafter Runge, Statement], available at

fact, LTV sales now far outpace sales of passenger cars.⁴² This popularity is driven by SUVs, which comprise the bulk of LTV sales.⁴³

The rise of the SUV has come at the expense of sales of passenger cars. In 1975, cars accounted for 71.2% of all passenger vehicles sold in the U.S.; by 2004, that figure was down to 47.9%.⁴⁴ SUVs, on the other hand, had only a 1.8% market share in 1975; by 2004, however, SUVs accounted for 26.1% of all passenger vehicles sold.⁴⁵ The most explosive growth has occurred in large SUVs, defined as those with a wheelbase of over 110 inches.⁴⁶ Since 1987, the market share for small SUVs has actually declined, while the market share for large SUVs has increased by 28 times.⁴⁷ Despite safety concerns and rising fuel costs, SUVs continue to sell strongly.⁴⁸

<http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NHTSA%20Administration/Presentations%20&%20Speeches/Associated%20Files/Runge2003Feb26.pdf>.

42. U.S. Automobile and Truck Retail Sales: 1970–2004, <http://www.senate.michigan.gov/sfa/Economics/RetailAutoSales.PDF> (last visited Aug. 5, 2005). LTV sales overtook passenger car sales for the first time in 2001 (8,696,200 to 8,422,100). *Id.* By 2004, LTVs outsold cars 9,360,000 to 7,504,500. *Id.*

43. In 2004, SUVs accounted for 26.1% of all passenger vehicles sold, while pickups accounted for 15.2%, vans for 7%, and wagons for 3.7%. OFFICE OF TRANSP. AND AIR QUALITY, U.S. ENVTL. PROT. AGENCY, EPA 420-R-04-001, LIGHT-DUTY AUTOMOTIVE TECHNOLOGY AND FUEL ECONOMY TRENDS:1975 THROUGH 2004, at 36–40 (2004) [hereinafter EPA, TRENDS]. Sales of non-SUV LTVs such as pickups and vans remained fairly constant from 1975 until 2004, but the market share for SUVs has increased dramatically, up from 1.8% in 1975. *Id.*

44. *Id.* at 37.

45. *Id.* Just from 2002 to 2003, SUV registrations increased by 12%, compared to a .9% increase in car registrations. NHTSA, 2003 ASSESSMENT, *supra* note 28, at 53.

46. EPA, TRENDS, *supra* note 43, app. A, at A-12.

47. Large SUVs had an 0.1% market share in 1975, 0.4% in 1987, and 11.1% in 2004. *Id.* at 37.

48. In the first seven months of 2004, despite well-publicized safety concerns, SUVs accounted for 27.2% of passenger vehicle sales, up from 26% in the same period in 2003. Danny Hakim, *Safety Gap Grows Wider Between S.U.V.'s and Cars*, N.Y. TIMES, Aug. 17, 2004, at C1 [hereinafter Hakim, *Safety Gap*]. SUV sales hit a plateau in the first four months of 2005, however, down 1.7% from 2004 levels. Danny Hakim, *A Love Affair with S.U.V.'s Begins to Cool*, N.Y. TIMES, May 21, 2005, at A1. The recent decline may be the result of higher gas prices. *Id.* Executives at General Motors, however, insist that sales slowed because many large SUVs are nearing the end of their product cycles. *Id.* To kick-start sales, G.M. plans to introduce redesigned versions of large SUVs such as the Cadillac Escalade and Chevy Suburban in 2006. *Id.*

Further weakening the argument that gas prices are to blame, sales of full-size pickups—which consume as much fuel as SUVs—grew sharply in 2004. Danny Hakim, *Big Pickup Trucks Eclipsing S.U.V.'s*, N.Y. TIMES, Feb. 8, 2005, at C1 [hereinafter Hakim, *Eclipsing*]. The line between large SUVs and pickups is blurring, as “American buyers seem to want their big pickups bigger and more S.U.V.-like.” *Id.*

A. *The Basics of SUV Design*

SUVs are designed quite differently than cars.⁴⁹ Cars have to be light enough to meet fuel-efficiency standards, yet safe enough to meet safety standards.⁵⁰ As such, cars utilize an expensive and elaborately engineered form of construction called “unit body,” in which the underbody, sides and roof form a single structure.⁵¹ This provides built-in “crumple zones” that absorb energy in a crash.⁵² SUVs, which are exempt from fuel efficiency regulations, use a simpler, cheaper, and heavier design called “body-on-frame.”⁵³ The frame consists of two steel rails running the length of the SUV, connected to one another with welded crossbeams to form a kind of ladder; the rest of the vehicle is then bolted on.⁵⁴ The result is a stiffer underbody that fails to crumple in a crash.⁵⁵ In fact, the stiffness of an SUV is twice that of a passenger car.⁵⁶

Of course, SUVs also weigh a good deal more than cars, and the disparity is growing.⁵⁷ Between 1990 and 2001, driven by the proliferation of SUVs, the average weight difference between LTVs and cars increased from 830 lbs. to 1130 lbs.⁵⁸ SUVs are also much taller than the average car, with more ground clearance, higher roofs, and higher hoods. While cars are required by federal regulation to keep their bumpers between 16 and 20 inches off the ground, SUVs are exempt from such requirements because the federal government classifies SUVs as light trucks.⁵⁹

49. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 85–87; *see also* Gladwell, *Big and Bad*, *supra* note 5, at 28; Michelle J. White, *The “Arms Race” on American Roads: The Effect of Sport Utility Vehicles and Pickup Trucks on Traffic Safety*, 47 J.L. & ECON. 333, 333–34 (2004) [hereinafter White, *Arms Race*].

50. Gladwell, *Big and Bad*, *supra* note 5, at 28.

51. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 85; Gladwell, *Big and Bad*, *supra* note 5, at 28.

52. Gladwell, *Big and Bad*, *supra* note 5, at 28; White, *Arms Race*, *supra* note 49, at 334.

53. Gladwell, *Big and Bad*, *supra* note 5, at 28; BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 85.

54. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 85–86.

55. *Id.* at 87; White, *Arms Race*, *supra* note 49, at 334.

56. Runge, Statement, *supra* note 41.

57. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 145 (noting that “SUVs typically outweigh cars and minivans by at least a quarter-ton and sometimes as much as a full ton”).

58. Runge, Statement, *supra* note 41.

59. *See* 49 C.F.R. § 581.1–.3 (2004) (applying bumper standard to passenger vehicles only); 49 C.F.R. § 523.5 (2004) (defining “light trucks” as opposed to “passenger vehicles”); *see also* *Huge Cost of Bumper Mi\$match*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Sep. 13, 2004, at 5.

B. *The Dangers SUVs Pose to Their Occupants*

Most Americans believe that SUVs are safer than cars.⁶⁰ However, research has shown this to be nothing but a myth.⁶¹ Rather, the opposite is true: statistics suggest that SUVs are actually deadlier to their occupants than cars.⁶² In 2003, for instance, drivers and passengers in an SUV were nearly 11% more likely to die in an accident than drivers or passengers in a car.⁶³ Children are particularly at risk. More and more children ride in SUVs; in fact, SUVs are now the second-most common way of transporting children, behind minivans.⁶⁴ However, a child riding in an SUV is twice as likely to die as a child riding in a minivan.⁶⁵

The principal threat to SUV occupants comes from an SUV's tendency to rollover.⁶⁶ Despite widespread media attention and litigation over rollover problems, SUV rollover fatalities more than doubled from 1991 to 2000.⁶⁷ SUVs roll over nearly three times as often as passenger cars,⁶⁸ and more than pickups as well.⁶⁹

60. Cloud, *SUV Rage*, *supra* note 27, at 36; Myron Levin, *Study Questions Safety of SUVs*, L.A. TIMES, Feb. 18, 2003, at C1 [hereinafter Levin, *Study Questions Safety*]; Joan Claybrook, President, Pub. Citizen, Former Admn'r, Nat'l Highway Traffic Safety Admin., Testimony before the Senate Committee on Commerce, Science and Transportation: Profit-Driven Myths and Severe Public Damage: The Terrible Truth About SUVs 3 (Feb. 26, 2003) [hereinafter Claybrook, Testimony], available at http://www.citizen.org/documents/JC_SUV_testimony.pdf.

61. A detailed study of SUVs and cars over five model years concluded that SUVs are not safer for their drivers, even without taking into account the risks SUVs pose to others on the roads. See MARC ROSS & TOM WENZEL, U.S. DEP'T OF ENERGY, REPORT NO. T021, AN ANALYSIS OF TRAFFIC DEATHS BY VEHICLE TYPE AND MODEL 3-6 (2002) [hereinafter ROSS AND WENZEL, ANALYSIS], available at <http://www.aceee.org/pubs/t021full.pdf>.

Even subcompacts such as the Volkswagen Jetta and the Honda Civic were found to be as safe for their drivers as the average SUV. *Id.* at 5; Levin, *Study Questions Safety*, *supra* note 60 (discussing the Ross and Wenzel study); Claybrook, Testimony, *supra* note 60, at 3.

62. From 2002 to 2003, while the overall fatality rate for occupants of passenger vehicles declined by nearly 3%, the fatality rate for SUV occupants increased by 10%. NHTSA, 2003 ASSESSMENT, *supra* note 28, at 49. Other than SUVs, every other passenger vehicle category registered a decline: a 5.4% decrease in the fatality rate for cars, a 2% decrease for vans, and a 3.2% decrease for pickup trucks. *Id.* From 2003 to 2004, fatalities declined 2.4% in passenger cars while increasing 4.9% in SUVs. U.S. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2004 PROJECTIONS: MOTOR VEHICLE TRAFFIC CRASH FATALITIES AND INJURIES 16 (2005) [hereinafter NHTSA, 2004 PROJECTIONS], available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/PPT/2004EARelease.pdf>.

63. Hakim, *Safety Gap*, *supra* note 48.

64. PUBLIC CITIZEN, SUVs: THE HIGH COSTS OF LAX FUEL ECONOMY STANDARDS FOR AMERICAN FAMILIES 10 (2003) [hereinafter PUBLIC CITIZEN, HIGH COSTS], available at http://www.citizen.org/documents/costs_of_suvs.pdf.

65. *Id.* at 10, 14-15.

66. Hakim, *Safety Gap*, *supra* note 48. Rollovers accounted for 59% of SUV fatalities in 2003, and 61% in 2002. NHTSA, 2003 ASSESSMENT, *supra* note 28, at 89.

67. NHTSA, ROLLOVER CRASHES, *supra* note 2, at 2, 6.

68. Runge, Statement, *supra* note 41.

69. From 2002 to 2003, rollover fatalities in SUVs increased by 6.8%, while rollover fatalities in pickups declined by 6.8%, and in cars declined by 7.5%. NHTSA, 2003 ASSESSMENT, *supra* note 28, at

Another risk to SUV occupants arises when an SUV crashes into a fixed object, such as a retaining wall, telephone pole, or other roadside hazard. Because of the SUV's stiff frames and lack of crumple zones, the force of the impact is transmitted directly to the SUV's occupants.⁷⁰ For example, if the driver of a 2002 Cadillac Escalade—one of the largest SUVs on the market—crashed into an unyielding surface at thirty-five miles an hour, he would have a 16% chance of sustaining a life-threatening head injury and a 20% chance of receiving a life-threatening chest injury.⁷¹ That same driver in a Ford Windstar—a large minivan with a similar seating capacity to the Escalade—would have only a 2% chance of a life-threatening head injury, and only a 4% chance of a life-threatening chest injury.⁷² Thus, the driver of the Escalade would be five to eight times more likely to die when hitting a fixed object at a moderate speed than the driver of the minivan.

C. *The Dangers SUVs Pose to Others*

Some of the same design characteristics of SUVs that make them such a danger to their occupants, namely their extra height and frame design, become particularly lethal in collisions with other vehicles.⁷³ This issue is beginning to gain more attention. The National Highway and Traffic Safety Administration (NHTSA) recently warned of the “large and growing” problem of fatalities in collisions between LTVs and cars.⁷⁴ In fact, Dr. Jeffery Runge, the administrator of the NHTSA, recently informed Congress of the frightening statistic that in two-vehicle fatal collisions involving LTVs and passenger cars, 80% of the fatalities were to the occupants of the passenger cars.⁷⁵

83. From 2003 to 2004, rollover fatalities declined 3.1% in cars and 2.6% in pickups; SUV rollover deaths increased by 6.9%. NHTSA, 2004 PROJECTIONS, *supra* note 62, at 18.

70. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 169.

71. *Id.* at 144.

72. *Id.*

73. *Id.* at 169.

74. NHTSA, VEHICLE COMPATIBILITY, *supra* note 4, at 16. In addition, the Insurance Institute for Highway Safety has issued several special reports in recent years to address the issue of SUV-car collisions. See, e.g., *In Collisions with Cars, SUVs are Incompatible. Are SUVs That Are Bigger and Heavier Posing Even More Risks?*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Apr. 28, 2005.

75. Runge, Statement, *supra* note 41. At first glance, statistics like those stated by Dr. Runge—showing that SUV occupants are much less likely to die in collisions with cars—might appear to contradict the discussion in the previous section which noted that SUVs are more dangerous to their occupants than cars. See Hakim, *Safety Gap*, *supra* note 48 (reporting that SUV occupants were nearly 11% more likely to die than car occupants in 2003). The greater danger to SUV occupants, however, does not result from collisions with other vehicles; rather, as discussed, SUVs injure and kill their occupants in rollovers and collisions with fixed objects. See *supra* notes 61–72 and accompanying text. Thus, far

The statistics are indeed alarming. In 2003, crashes between a car and an LTV resulted in a death rate for the occupants of the car more than four times that of the occupants of the LTV.⁷⁶ These numbers increase exponentially when an LTV strikes a car broadside. Statistics show that when LTVs struck passenger cars in the side in 2003, twenty-four times more occupants of the cars perished than occupants of the LTVs.⁷⁷ In contrast, when cars hit LTVs in the side, the ratio was more or less even.⁷⁸

Isolating SUVs from other LTVs such as vans and pickup trucks illustrates their inherent danger. A composite of fatality data from 1995 to 2001 shows that head-on collisions between a car and an SUV killed 4.5 drivers in the car for every one driver in the SUV.⁷⁹ SUVs ramming into the sides of cars killed twenty-two car drivers for every one in the SUV.⁸⁰ Car-to-car broadside deaths were substantially lower, with a ratio of 8.2 to 1.⁸¹

The threat posed by large SUVs is even greater. In fact, the NHTSA has concluded that large SUVs are more dangerous in side-impact crashes than both full-size vans and full-size pickup trucks.⁸² A study by the Insurance Institute for Highway Safety (IIHS) in 1998 found that when a large SUV—defined as one weighing more than 4,000 lbs.—strikes the side of a car, regardless of the car's weight, the car's occupant is 48 times more likely to die than the driver of the SUV.⁸³ The years since that study have seen the proliferation of even larger "behemoth" SUVs such as the Hummer H1 (7,847 lbs. curb weight), the Ford Excursion (6,734 lbs.),⁸⁴ and the new International CTX (14,500 lbs.).⁸⁵

from being inconsistent, the statistics actually highlight the lethality of SUVs to their own occupants, for if SUV occupants survive more crashes with cars yet continue to die at a higher rate, then the roll-over problem must indeed be quite severe.

76. The exact numbers were 4,481 fatalities in the LTVs, to 1,098 in the cars. NHTSA, 2003 ASSESSMENT, *supra* note 28, at 96.

77. *Id.* at 98.

78. NHTSA, VEHICLE COMPATIBILITY, *supra* note 4, at 14.

79. *Id.* at 15.

80. *Id.* at 16.

81. *Id.*

82. STEPHEN M. SUMMERS ET AL., U.S. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PAPER #307, NHTSA'S RESEARCH PROGRAM FOR VEHICLE COMPATIBILITY 3 [hereinafter NHTSA, RESEARCH PROGRAM], available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-11/18ESV-000307.pdf> (last visited Sep. 17, 2005).

83. IIHS, *Vehicle weight*, *supra* note 8, at 10.

84. See Edmunds.com, <http://www.edmunds.com> (last visited Sep. 17, 2005) (vehicle curb weights for model years 2005 and 2006). By way of comparison, the 2005 Honda Civic has a curb weight of 2,598 lbs. *Id.*

85. See International CTX Product Specifications, <http://www.internationaldelivers.com/assets/pdf/CXTdetail.pdf> (last visited Aug. 4, 2005). Introduced in September 2004, the CTS is a giant SUV/pickup hybrid which International calls an "extreme truck." Hakim, *Stars*, *supra* note 7. At over seven tons, it weighs more than twice as much as a Hummer H2. *Id.* Based on initial sales success, International plans to introduce two more "Godzilla-size" models in 2005. *Id.* Nine feet tall, the CTX

The reasons for the huge disparity in SUV and car fatalities are crash compatibility and aggressivity.⁸⁶ Compatibility involves how vehicles physically match up with each other in the event of a collision.⁸⁷ Aggressivity measures the potential of one vehicle to inflict damage on another.⁸⁸ A vehicle's aggressivity is measured by comparing the number of crashes a vehicle is involved in with the number of driver fatalities occurring in the other vehicle.⁸⁹ A vehicle that is not physically compatible with other vehicles will have greater aggressivity.⁹⁰

SUVs are incompatible with passenger cars in three ways: weight, stiffness, and height.⁹¹ SUVs, of course, tend to be the heaviest class of vehicles on the road, often outweighing cars by a ton or more.⁹² Lighter vehicles are at a fundamental disadvantage when the vehicles they collide with are heavier⁹³ because the heavier vehicle transfers the violence of the impact to the lighter vehicle.⁹⁴ In a head-on collision, the heavier vehicle knocks the lighter one backwards, resulting in greater injury to the occupants of the lighter vehicle than if they had hit an immovable barrier at the same speed.⁹⁵

Weight disparities among vehicles are not new; smaller cars have always shared the roads with larger ones. However, more than mere weight discrepancy is involved here. Even when compared to cars of similar weights, LTVs are more than twice as likely to cause a fatality when striking a car.⁹⁶ This is due to the second major incompatibility of SUV design: stiffness.⁹⁷ The rigid frame-rail designs employed in the construction of SUVs make them twice as stiff as passenger cars, which have softer "unit body" construction.⁹⁸ In a collision between vehicles—even of the same weight—the stiffer vehicle transfers most of the crash energy to the less-stiff collision partner.⁹⁹ The NHTSA has found a direct correlation between

rides at the height of an eighteen-wheeler; however, the CTX does not require a commercial operator's license. *Id.*

86. Hakim, *Regulator Takes Aim*, *supra* note 3.

87. *Id.*

88. *Id.*

89. NHTSA, RESEARCH PROGRAM, *supra* note 82, at 2.

90. GABLER & HOLLOWELL, AGGRESSIVITY, *supra* note 6.

91. *Id.*

92. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 170.

93. GABLER & HOLLOWELL, AGGRESSIVITY, *supra* note 6.

94. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 170.

95. IIHS, *Vehicle Weight*, *supra* note 8, at 8.

96. Runge, Statement, *supra* note 41.

97. GABLER & HOLLOWELL, AGGRESSIVITY, *supra* note 6.

98. *Id.*; see *supra* notes 49–59 and accompanying text.

99. White, *Arms Race*, *supra* note 49, at 334. In one experiment, researchers tested a Ford Ranger pickup, upon whose frame the Explorer SUV is based, in a collision with a Taurus. The weight of the

vehicle stiffness and fatalities in cars.¹⁰⁰ When stiffness incompatibility is combined with the huge weight disparity between SUVs and cars, the result is that the cars get crushed and knocked backward at the same time.¹⁰¹

However, the deadliest incompatibility is the height differential. Ideally, the bumpers and frame structures of two vehicles should more or less line up in a collision, absorbing as much of the impact energy as possible, and transferring less of that energy to the vehicles' occupants.¹⁰² But SUVs ride higher than cars, allowing the SUV to bypass the car's crumple zones and energy-absorbing structural features.¹⁰³ SUV bumpers are exempt from the height requirements of cars, and they are usually mounted much higher. Even more problematic are the SUV's high frame rails, which override the car's frame or miss it altogether.¹⁰⁴ The result in a front-end collision is that the stiff front end of the SUV soars over the car's crumple zone and plows up to the base of the windshield, often shoving the contents of the car's engine compartment through the chests of the car's driver and front-seat passenger.¹⁰⁵ An even more gruesome result occurs when an SUV broadsides a car. The SUV's stiff front end bypasses the rigid sill area at the base of the car's door, instead going right through the much softer door.¹⁰⁶ Failing to engage any energy-absorbing feature of the car, the full force of the SUV rams into the car's passenger compartment, striking the occupants with little or no dilution of the crash forces.¹⁰⁷ To make matters worse, many of the most popular SUVs, such as the Ford Explorer, were designed with frame rails that actually curved *upwards* at the front.¹⁰⁸ In a side impact, these upward curving frame rails can pierce a car's passenger compartment and effectively spear its occupants.¹⁰⁹ Finally, in side impact collisions, the extra hood height of an SUV makes it more likely to strike a car occupant in the head.¹¹⁰

vehicles was about the same, but the Taurus suffered significantly more damage. GABLER & HOLLOWELL, *AGGRESSIVITY*, *supra* note 6.

100. NHTSA, *VEHICLE COMPATIBILITY*, *supra* note 4, at 17-18.

101. IIHS, *Vehicle Weight*, *supra* note 8, at 8.

102. *Id.* at 8-9.

103. GABLER & HOLLOWELL, *AGGRESSIVITY*, *supra* note 6.

104. Runge, *Statement*, *supra* note 41.

105. Latin, *Bad Designs*, *supra* note 1, at 1201-02.

106. IIHS, *Vehicle Weight*, *supra* note 8, at 9.

107. GABLER & HOLLOWELL, *AGGRESSIVITY*, *supra* note 6.

108. Keith Bradsher, *Changes in Ford Explorer Aim at Protecting Other Motorists*, N.Y. TIMES, Aug. 4, 2000, at C1 [hereinafter Bradsher, *Changes*].

109. *Id.*

110. *Putting the Crash Compatibility Issue in Perspective*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Oct. 30, 1999, at 10.

In addition to those killed by SUVs in cars, there is growing awareness of the dangers that SUVs pose to pedestrians, particularly children. A recent NHTSA research report, studying data from 1997 to 2001, found that SUVs, along with pickups and vans, fatally injured pedestrians at a higher rate than passenger cars.¹¹¹ The greatest difference was seen among children under eight years old.¹¹² At first glance, it seems obvious that a Hummer will injure a pedestrian more than a Geo Metro will, just as a Mack truck will probably cause more severe injuries than a Hummer. However, researchers have found that the severity of pedestrian injuries was not linked to the SUV's greater weight; after all, even a small car is a heavy object when compared to a pedestrian.¹¹³ Rather, the exacerbated injuries were once again a result of vehicle stiffness and front end design.¹¹⁴ When a pedestrian is struck by a car, she will likely be flipped over onto the soft hood of the car, often causing severe leg injuries but sparing a life-threatening injury to her head or chest.¹¹⁵ An SUV's greater height and boxy front end design, on the other hand, will guarantee that the force of the full mass of the vehicle will slam into her head or chest. If that fails to kill her, it will nonetheless knock her down, and the SUV will then run over her. If she were hit by a car instead, she would be flipped onto the soft hood and then roll off.¹¹⁶

It is not hard to see why children are most at risk from the front end design of SUVs. The hood of the Hummer H2 stands fifty-one inches off the ground.¹¹⁷ This is roughly the level of a child's head. Even at a low speed, a child struck by a Hummer would stand little chance of survival. Furthermore, the NHTSA has found that drivers of higher elevated vehicles with a larger frontal configuration, such as the Hummer and other large SUVs, are more likely to have their view of smaller pedestrians obstructed.¹¹⁸ Of course, no Hummer driver wants to kill a child; however, if the driver cannot see the child, no amount of carefulness is going to help. This is exacerbated by the fact that—unlike other large vehicles like tractor

111. NHTSA, CHILD PEDESTRIAN, *supra* note 10, at 3. There are of yet no statistics which break out SUVs from vans and pickups in this regard. However, vans often have oversized side mirrors, and are usually used in commercial activities, not in the family driveway.

112. *Id.*

113. DEVON E. LEFLER & HAMPTON C. GABLER, SEVENTEENTH INT'L CONFERENCE ON ENHANCED SAFETY OF VEHICLES, THE EMERGING THREAT OF LIGHT TRUCK IMPACTS WITH PEDESTRIANS 5 (2001), <http://www.me.vt.edu/gabler/publications/esvpdpaper212.pdf>.

114. *Id.*

115. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 233; *see also* White, *Arms Race*, *supra* note 49, at 334.

116. White, *Arms Race*, *supra* note 49, at 334.

117. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 400.

118. NHTSA, CHILD PEDESTRIAN, *supra* note 10, at 3.

trailers and commercial vans—SUVs are commonly driven in residential neighborhoods, where most accidents involving children occur.

The long “blind spots” inherent in SUV design are also a factor in the increasing problem of children being run over by vehicles that are backing up.¹¹⁹ SUVs often have blind spots that extend twenty-two to thirty-eight feet behind the vehicle.¹²⁰ A recent NHTSA study of death certificates has found that “backing up” deaths particularly affect children under five years old, and that these deaths tend to involve SUVs.¹²¹

The massive size of SUVs can block the vision of other drivers as well. One simply cannot see around these vehicles.¹²² In addition, many SUV windows are either set higher than car windows, or are tinted so that one cannot see through them.¹²³ The NHTSA has recognized that the blocked vision of car and motorcycle drivers, due to the higher profile of SUVs and other LTVs, is a serious obstacle to crash avoidance.¹²⁴

Another crash avoidance problem is the glare from an SUV’s higher mounted headlamps.¹²⁵ A study by the Society of Automotive Engineers (SAE) recently found that headlight glare rises as much as 1000% when the headlight is mounted at the height of a driver’s eyes or side mirror.¹²⁶ An SUV can thus temporarily blind drivers coming the other way and drivers ahead of it in traffic.

Taken separately, the glare and visibility problems would be annoying and dangerous, but could probably be ameliorated somewhat with new technology and better federal regulations regarding headlight and window placement. But taken together with the rate at which SUVs kill other drivers and pedestrians, a picture emerges of a product that poses such dangers to society that it is a wonder it is allowed on the roads at all.

119. Hampel, *Blind Spots*, *supra* note 13.

120. *Id.*

121. See U.S. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DATA COLLECTION STUDY: DEATHS AND INJURIES RESULTING FROM CERTAIN NON-TRAFFIC AND NON-CRASH EVENTS app. V, at 58 (2004), <http://www.nhtsa.dot.gov/cars/problems/studies/NonTraffic-NonCrash/Images/noncrash.pdf>.

122. See BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 226 (noting the “imposing wall of sheet metal and tinted glass” presented by a big SUV).

123. *Id.*

124. U.S. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., NHTSA VEHICLE SAFETY RULEMAKING PRIORITIES AND SUPPORTING RESEARCH: CALENDAR YEARS 2003–2006, <http://www.nhtsa.gov/cars/rules/rulings/PriorityPlan/FinalVeh/Index.html> (last visited Aug. 4, 2005).

125. *Id.*

126. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 228. The Hummer H2, for example, carries its headlights 43.5 inches off the ground. *Id.*

D. Industry, Regulatory, and Insurance Reaction to SUV Dangers

In the face of such overwhelming statistical evidence, auto manufacturers insist that SUVs are safe.¹²⁷ General Motors recently stated that SUVs “are among the safest vehicles on the road and have contributed to the substantial decline in the nation’s fatality rate.”¹²⁸ However, the industry’s actions belie its words.¹²⁹ In 2000, as the problem of crash compatibility became increasingly publicized, Ford made several changes to its SUV lineup.¹³⁰ The upward curving frame rails on the mid-sized Explorer SUV were inverted, now curving downwards so as to meet the frame of a Ford Taurus mid-sized sedan.¹³¹ However, the Explorer gained 200 extra pounds.¹³² For its immense Excursion SUV, which has very high frame rails, Ford opted to install a “blocker bar” underneath the frame rather than lower the rails.¹³³ The blocker bar is an energy-absorbing steel bar just behind the bumper, designed to engage the frame of a lower vehicle upon impact.¹³⁴

In December 2003, a consortium of automakers agreed on a voluntary effort to make SUVs more crash-compatible with cars.¹³⁵ Fifteen automakers from four nations agreed to redesign their light trucks—specifically SUVs and pickups—to make the frame rails and other front-end, crash-absorbing devices overlap with at least half of the similar area on passenger cars.¹³⁶ The pact is strictly voluntary, and the half-overlap goal does not need to be met until the 2009 model year.¹³⁷ Oddly, the pact only applies to vehicles under 10,000 pounds, which exempts the most massive SUVs like the Hummer H1.¹³⁸

127. ALLIANCE OF AUTOMOBILE MANUFACTURERS, THE FACTS ON SUV SAFETY (2004), <http://www.autoalliance.org/archives/suvsafety.pdf>; Hakim, *Safety Gap*, *supra* note 48.

128. Danny Hakim, *S.U.V.'s to Be Redesigned to Reduce Risk to Cars*, N.Y. TIMES, Dec. 4, 2003, at A1 [hereinafter Hakim, *Redesigned*].

129. For instance, despite industry claims that SUVs are safe, Ford, in February 2005, launched an ad campaign designed to teach young male drivers about the need to drive SUVs safely. Danny Hakim, *A message to the young: The S.U.V. Is a Big, Hairy Beast to Drive*, N.Y. TIMES, Feb. 2, 2005, at C10 [hereinafter Hakim, *Beast*].

130. Bradsher, *Changes*, *supra* note 108.

131. General Motors also began lowering its frame rails by two inches in 2001. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Hakim, *Redesigned*, *supra* note 128.

136. The pact came about after Dr. Runge, the NHTSA administrator, told automakers to voluntarily come up with something, or face regulation. *Id.*

137. *Id.*

138. *Id.*

There is a real question as to whether these changes, provided they occur, will actually result in better crash compatibility. A recent NHTSA test compared the redesigned 2003 Lincoln Navigator with the pre-reform 1999 version.¹³⁹ The 2003 Navigator, thanks to its blocker bar and lower bumper, already met the standard promulgated by the December 2003 IIHS pact.¹⁴⁰ The test crashed the 1999 and 2003 Navigators into a 1996 Dodge Neon.¹⁴¹ The result was, as predicted, less override from the 2003 model.¹⁴² However, the redesigned SUV caused worse injuries than the old one; in fact, the dummy “driver” of the Neon hit by the 2003 model suffered head and chest injuries more than twice as severe as the driver of the Neon hit by the 1999 model.¹⁴³ The NHTSA surmised that the benefits of the blocker bar and lower bumper had been more than offset by the fact that the 2003 Navigator was stiffer and heavier than the 1999 version.¹⁴⁴

Even if SUVs are designed to be more crash-compatible by 2009, and even if the benefits of front end overlap are not offset by ever-increasing SUV mass and stiffness, millions of older SUVs will remain on the road.¹⁴⁵ As they age, their brakes and suspensions will become suspect, leading to more collisions and more chances to inflict lethal injuries. Even more distressingly, as the price of used SUVs decreases, these SUVs will fall into the hands of teenagers and young male drivers, who tend to take more risks and drive more carelessly.¹⁴⁶ As one automotive expert put it in 2004, “A ‘97 Ford Expedition is seven years old and now down to an affordable price that a young male could buy. . . . To have that barreling down the road at 75 towards me is not something I’d like to think about.”¹⁴⁷

Regulatory response to the problem has been nonexistent. When Dr. Jeffrey Runge came to the NHTSA in 2002, he claimed to be determined to

139. NHTSA, RESEARCH PROGRAM, *supra* note 82, at 5.

140. Danny Hakim, *Many Trucks, But Not All, Face Redesign In Safety Plan*, N.Y. TIMES, Dec. 9, 2003, at C1. The Navigator is the twin to the Ford Excursion.

141. NHTSA, RESEARCH PROGRAM, *supra* note 82, at 5.

142. *Id.* at 6.

143. *Id.* at 7. In an understatement, an NHTSA researcher on the project said “[t]he driver of the Neon hit by the ‘03 Navigator did not fare better. . . . He fared a little worse.” Danny Hakim, *Revamped S.U.V. Found To Cause Worse Injuries*, N.Y. TIMES, May 14, 2003, at C12.

144. NHTSA, RESEARCH PROGRAM, *supra* note 82, at 8.

145. Danny Hakim, *Used S.U.V.’s Come Loaded, With Safety Concerns*, N.Y. TIMES, June 26, 2005, § 4, at 3. According to the auto industry, the average vehicle stays on the road for 15 years or 170,000 miles. *Id.*

146. Joan Claybrook, the president of Public Citizen and a former top auto safety regulator, notes that older SUVs will end up with drivers who are higher risk takers, more likely to speed, to drink and drive, or not properly care for their vehicles’ maintenance. *Id.* Similarly, the chief operating officer of the IIHS notes that SUVs are likely to fall into the hands of young males, who are the highest risk group of drivers. Danny Hakim, *Is the Car Unsafe, or the Driver?*, N.Y. TIMES, Mar. 15, 2005, at C1.

147. Hakim, *Beast*, *supra* note 129.

do something about vehicle incompatibility.¹⁴⁸ Instead, he approved of the voluntary approach taken by the automakers. Moreover, in 2002, the Bush Administration pushed through a tax loophole that allowed small businesses—including doctor and attorney practice groups—to write off most of the purchase price of large SUVs such as Hummers.¹⁴⁹

The insurance industry has taken a mixed approach. One might think that insurance companies would demand higher premiums from drivers of large SUVs, given the large damage costs incurred by these vehicles.¹⁵⁰ A few insurance companies, such as Allstate and Progressive, adjust their rates for larger SUVs.¹⁵¹ Most, however, do not.¹⁵² In fact, State Farm, the nation's largest auto insurer, refuses to charge higher premiums for large SUVs.¹⁵³ The reason: a State Farm actuary has explained that large SUVs actually save money for insurers.¹⁵⁴ This is because when an SUV collides with a car, the occupants of the car are usually killed rather than maimed.¹⁵⁵ For State Farm, death settlements are cheaper than injury settlements.¹⁵⁶

II. LITIGATING SUV DESIGN AS A DESIGN DEFECT

A. *Does an SUV Manufacturer Owe a Duty of Care to Collision Victims?*

There has been no shortage of lawsuits against SUV manufacturers. Most SUV litigation has focused on the injury to the SUV's occupants, particularly in rollover accidents.¹⁵⁷ Many plaintiffs have successfully argued that the increased tendency of SUVs to rollover is a design defect that creates unreasonable risks to their occupants.¹⁵⁸ However, in the case of an SUV-car collision, there is a significant legal hurdle that a plaintiff would need to overcome before recovering damages from the SUV manufacturer.

148. Hakim, *Regulator Takes Aim*, *supra* note 3.

149. Danny Hakim, *In Tax Twist, Big Vehicles Get the Bigger Deductions*, N.Y. TIMES, Dec. 20, 2002, at C1. The amount of the tax break was rolled back to \$25,000 in 2004 after criticism from taxpayer and environmental groups. Danny Hakim, *Senate Moves to Restrict Incentives for Big S.U.V.'s*, N.Y. TIMES, Feb. 21, 2004, at C2.

150. White, *Arms Race*, *supra* note 49, at 351.

151. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 213–15.

152. *Id.* at 220; White, *Arms Race*, *supra* note 49, at 351–52.

153. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 220.

154. *Id.* at 215.

155. *Id.*

156. *Id.*; see also Froma Harrop, *Putting the Brakes on Suburban Assault Vehicles*, MILWAUKEE J. SENTINEL, Nov. 3, 1997, at 10A.

157. See, e.g., *Clay v. Ford Motor Co.*, 215 F.3d 663 (6th Cir. 2000); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999).

158. See, e.g., *Clay*, 215 F.3d at 669–71.

The problem is that when the plaintiff is an occupant of the car, rather than the SUV, the injured party is not a user of the product. Thus, the initial question in such a case is whether a lawsuit may even be brought against an SUV manufacturer by a non-user who is injured as the result of an allegedly defective design.

It is well settled that an automobile manufacturer owes a duty to bystanders for those injuries that are foreseeable to the manufacturer.¹⁵⁹ The Restatement (Second) of Torts states that a manufacturer can be liable for a product defect that "he should recognize as involving an unreasonable risk of causing physical harm to those who use it . . . and to those whom he should expect to be endangered by its probable use. . . ."¹⁶⁰ Comment (i) explicitly addresses automobiles:

Thus the manufacturer of an automobile, intended to be driven on the public highway, should reasonably expect that, if the automobile is dangerously defective, harm will result to any person on the highway, including pedestrians and drivers of other vehicles and their passengers and guests.¹⁶¹

The most influential case in applying this doctrine to carmakers is *Elmore v. American Motors Corp.*, in which a defective driveshaft caused a vehicle to lose control and strike another car.¹⁶² The court noted that a defective automobile is a danger "not only to the driver and passenger of the car but also to pedestrians and other drivers."¹⁶³ The court reasoned:

The public policy which protects the driver and passenger of the car should also protect the bystander, and where a driver or passenger of another car is injured due to defects in the manufacture of an automobile . . . they may recover from the manufacturer of the defective automobile.¹⁶⁴

Most, if not all jurisdictions have adopted bystander liability.¹⁶⁵ However, in the typical bystander liability case such as *Elmore*, the defect that caused the injury to the plaintiff was also responsible for causing the accident itself.¹⁶⁶ This would not be the case in a typical SUV-car collision.

159. See, e.g., *Elmore v. Am. Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969).

160. RESTATEMENT (SECOND) OF TORTS § 395 (1965) (emphasis added).

161. RESTATEMENT (SECOND) OF TORTS § 395 cmt. i (1965).

162. 451 P.2d at 85-86.

163. *Id.* at 89. See also *Codling v. Paglia*, 298 N.E.2d 622, 624 (N.Y. 1973) (holding automobile manufacturer liable when a defective steering mechanism caused a car to lose control and strike another car).

164. *Elmore*, 451 P.2d at 89.

165. See *Valk Mfg. Co. v. Rangaswamy*, 537 A.2d 622, 631 (Md. Ct. Spec. App. 1988) ("The general consensus clearly favors 'bystander' recovery."), *rev'd on other grounds*, *Montgomery County v. Valk Mfg. Co.*, 562 A.2d 1246 (Md. 1989).

166. See *Elmore*, 451 P.2d at 85-87 (defective driveshaft caused a Rambler to fishtail and cross the center line, where it collided with the co-plaintiff's car).

The injured car occupant would allege that the frame design, height, and weight of the SUV constitute a design defect that poses an unreasonable risk of harm to others.¹⁶⁷ However, unless these characteristics caused the SUV to roll over and then collide with the car, it would be unlikely that these characteristics would cause a collision in and of themselves. Instead, the plaintiff would be alleging that in the event of *any* collision, the SUV's design made her injuries worse than they would have otherwise been. Thus, the next issue is whether an SUV manufacturer may be sued for injuries that are enhanced by the SUV's allegedly defective design, when that design was not the cause of the collision in the first place.

Most jurisdictions have accepted an "enhanced injury" rule, also known as the "crashworthiness" or "second collision" doctrine.¹⁶⁸ Under the enhanced injury rule, an auto manufacturer may be held liable for injuries sustained in an accident, even when a defect in the vehicle merely enhanced the injuries, but did not cause the accident.¹⁶⁹ The leading case establishing the enhanced injury rule is *Larsen v. General Motors*.¹⁷⁰ In *Larsen*, the driver of a Chevy Corvair was injured when the Corvair's steering column rammed into his head after a head-on collision with another car.¹⁷¹ The steering column had nothing to do with the collision, but it was positioned so that it absorbed the energy of the impact and was transformed into a lethal projectile.¹⁷² The crucial portion of the court's reasoning was that accidents are foreseeable to a carmaker: "Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable."¹⁷³ Perhaps the most famous application of the enhanced injury rule is in the Ford Pinto cases, in which improperly mounted gas tanks exploded after rear-end collisions that would have been otherwise unremarkable.¹⁷⁴

An occupant of a car struck by an SUV thus finds initial support for her cause in two well-established doctrines. First, under bystander liability

167. See *De Veer v. Land Rover N. Am., Inc.*, No. B141538, 2001 WL 34354946, *1 (Cal. Ct. App. Aug. 14, 2001).

168. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 16 cmt. a, reporter's note (1998) ("The *Larsen* [enhanced injury] rule appears now to be the unanimous position of American courts.").

169. See *Huff v. White Motor Corp.*, 565 F.2d 104, 109 (7th Cir. 1977); *D'Amario v. Ford Motor Co.*, 806 So.2d 424, 426 (Fla. 2001); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 226 (Iowa 1992); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 16 (a) (1998) ("When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm.").

170. 391 F.2d 495 (8th Cir. 1968).

171. *Id.* at 497.

172. *Id.*

173. *Id.* at 502.

174. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981).

doctrine, the manufacturer of the SUV can be liable to other drivers for injuries resulting from a defective design.¹⁷⁵ Second, under the enhanced injury rule, the SUV manufacturer may be liable for enhanced injuries resulting from the defective design, even if that defective design was not the cause of the accident.¹⁷⁶ However, the traditional application of these doctrines creates an additional hurdle. In the typical bystander liability case, as discussed above, the allegedly defective design was the direct cause of the accident that resulted in the injuries. This would not be the case here, where the plaintiff would argue that the defective SUV design merely *enhanced* the injuries she suffered from an accident that would have occurred anyway.¹⁷⁷ Yet most enhanced injury cases involve injuries to the occupants of the allegedly defective vehicle, and not to bystanders or other drivers.¹⁷⁸ In effect, the injured occupant of the car in an SUV-car collision would be asking the court to combine the bystander liability and enhanced injury doctrines. The court would have to accept the notion that the SUV manufacturer can be liable to occupants of *other* vehicles for their *enhanced* injuries, suffered as the result of an allegedly defective design, even when that defective design was not the cause of the accident.

There is substantial precedent for extending the enhanced injury rule to apply to non-users of a product. In cases from the 1970s involving car-motorcycle collisions, two circuit courts of appeal applied the enhanced injury rule to the injured motorcyclists. In *Passwaters v. General Motors*, the plaintiff—a passenger on a motorcycle that collided with a Buick—was injured when her leg came into contact with one of the Buick’s wheel covers.¹⁷⁹ The wheel covers had protruding metal flanges that essentially turned into propeller blades at highway speeds.¹⁸⁰ When the Buick collided with the motorcyclist, the flanges sliced into the plaintiff’s calf, nearly severing her leg.¹⁸¹ The court noted that the accident was not caused by the wheel covers, but by the Buick striking the motorcycle’s handlebar while trying to pass.¹⁸² Nonetheless, after concluding that there was ample evidence that this design was unsafe, the court stated, “We think it now settled that a manufacturer does have the responsibility to avoid design in automobiles which can reasonably be foreseen as initially causing *or aggravating*

175. See *supra* notes 159–65 and accompanying text.

176. See *supra* notes 168–74 and accompanying text.

177. See *De Veer v. Land Rover N. Am., Inc.*, No. B141538, 2001 WL 34354946, *2 (Cal. Ct. App. Aug. 14, 2001).

178. See, e.g., *Larsen*, 391 F.2d at 497.

179. 454 F.2d 1270, 1272 (8th Cir. 1972) (applying Iowa law).

180. *Id.*

181. *Id.*

182. *Id.*

serious injury to users of the highway when a collision occurs.”¹⁸³ Thus, in one fell swoop, the court accepted not only the enhanced injury rule, but it extended the rule to all “users of the highway.”¹⁸⁴ In fact, quoting *Elmore*, the court reasoned that “[i]f anything, bystanders should be entitled to greater protection than the consumer or user” of the vehicle.¹⁸⁵

In *Knippen v. Ford*, a motorcyclist was struck by a Mercury that made a left turn in front of him.¹⁸⁶ Due to a sharp metal triangle in the Mercury’s turn signal assembly, the motorcyclist lost a good part of his lower left leg.¹⁸⁷ The court adopted the enhanced injury rule of *Larsen*, affirming the trial court’s decision that even though the metal triangle was not the cause of the accident, Ford should be liable because the triangle enhanced Knippen’s injuries.¹⁸⁸ The court found nothing in *Larsen* to prevent an extension of the enhanced injury rule to parties other than the occupants of the allegedly defective vehicle, and noted the *Passwaters* holding with approval.¹⁸⁹

A more recent case provides further support. In *Valk Manufacturing v. Rangaswamy*, the driver of a Toyota was impaled on a snowplow hitch and killed when he was broadsided by a county truck.¹⁹⁰ The hitch, without a plow attached to it, protruded twenty-nine inches from the front of the truck.¹⁹¹ The plaintiffs, the driver’s family, argued that the hitch was defective because it lacked a “quick disconnect hose.”¹⁹² The hose would have made it easier to take off the hitch when the plow was not needed, because it would have prevented the hydraulic fluid from draining out and having to be replaced every time the hitch was reattached.¹⁹³ Expert testimony concluded that the driver’s injuries would have been significantly less severe had there not been a twenty-nine inch steel rod thrusting into the passenger cabin of the Toyota upon impact.¹⁹⁴ Unhesitatingly, the court applied the enhanced injury rule.¹⁹⁵ The court noted the “massive and essentially unanimous movement toward an expanded coverage for bystanders,” and held that the manufacturer of the hitch could be liable to the occupant of

183. *Id.* at 1276 (emphasis added).

184. *Id.*

185. *Id.* at 1279 (quoting *Elmore v. Am. Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969)).

186. 546 F.2d 993, 995 (D.C. Cir. 1976).

187. *Id.*

188. *Id.* at 995, 1001.

189. *Id.* at 1001.

190. 537 A.2d 622, 624 (Md. Ct. Spec. App. 1988), *rev’d on other grounds*, *Montgomery County v. Valk Mfg. Co.*, 562 A.2d 1246 (Md. 1989).

191. *Id.*

192. *Id.* at 628.

193. *Id.*

194. *Id.* at 633.

195. *Id.*

the Toyota, even though he was not a user of the product.¹⁹⁶ Although the decision was later reversed on grounds unrelated to the manufacturer's liability to the plaintiffs,¹⁹⁷ the decision is a clear example where a court had no qualms combining the bystander liability and the enhanced injury doctrines.

As of the time of writing, only one case directly addresses the issue of SUV-car collisions. In *De Veer v. Land Rover*, a California appellate court, in an unpublished opinion, was unwilling to combine the bystander liability doctrine with the enhanced injury rule.¹⁹⁸ In *De Veer*, a 1988 Range Rover broadsided the plaintiff's Saab, leaving her with serious head injuries.¹⁹⁹ She sued Land Rover, the maker of the Range Rover, claiming that the SUV's design enhanced her injuries.²⁰⁰ In particular, she claimed that the SUV's bumper height, front end stiffness, and frame rail design were unreasonably dangerous.²⁰¹ The court first disagreed with the plaintiff's assertion that the design was unreasonably dangerous and thus defective.²⁰² More importantly, the court held that the enhanced injury rule could not extend to the occupants of other vehicles when the alleged defect did not cause the initial collision.²⁰³ Ultimately, the court found that Range Rover did not owe a duty to occupants of other vehicles who suffer enhanced injuries.

The reasoning in *De Veer* runs counter to that of *Passwaters*, *Knippen*, and *Valk*. It also neglects to follow established product liability principles from its own jurisdiction, California.²⁰⁴ Furthermore, in addition to the above cases, bystanders have been allowed to recover for emotional distress suffered merely upon *witnessing* enhanced injuries caused by a product defect.²⁰⁵ If a duty extends to those who might be traumatized by

196. *Id.* at 631-32.

197. See *Montgomery County v. Valk Mfg. Co.*, 562 A.2d 1246, 1253 (Md. 1989). There, Maryland's highest court reversed the appellate court's decision to allow the hitch manufacturer to pursue contribution cross-claim against the county. *Id.* The court stated, "Nor do we comment on [the hitch manufacturer's] liability to the plaintiffs." *Id.* at 1249 n.6.

198. *De Veer v. Land Rover N. Am., Inc.*, No. B141538, 2001 WL 34354946, *3 (Cal. Ct. App. Aug. 14, 2001).

199. *Id.* at *1.

200. *Id.*

201. *Id.*

202. *Id.* at *4.

203. *Id.* at *2-3.

204. See *Latin, Bad Designs*, *supra* note 1, at 1180 (noting that the trial court in *De Veer* "ignored every influential California Supreme Court precedent" by finding that the SUV manufacturer owed no duty to other motorists).

205. See, e.g., *Shepard v. Superior Court*, 142 Cal. Rptr. 612 (Ct. App. 1977) (holding that Ford owed a duty and thus could be held liable to family members, who suffered emotional shock upon witnessing a child thrown from the rear of a Pinto and run over because of a defective door lock).

witnessing enhanced injuries, it makes little sense for there to be no duty to those who actually suffer the enhanced injuries.

As of the time of writing, *De Veer* remains the only decided case on the issue of SUV vehicle incompatibility. As a General Motors spokeswoman puts it, "G.M. is not aware of a single court that has recognized 'incompatibility' as a valid basis for a lawsuit against an auto manufacturer."²⁰⁶ Nonetheless, the auto industry has begun settling lawsuits brought over SUV and pickup truck incompatibility, some of them for millions of dollars.²⁰⁷ No automaker has admitted liability, of course, and the settlements are confidential. However, the auto manufacturers are clearly not relying on the *De Veer* decision to prevent those injured by SUVs from having their day in court.

B. *The Risk-Utility Test: The Marginal Utility of SUVs*

One or both of two different tests are used to determine whether a product design is defective: a consumer expectations test, or risk-utility balancing.²⁰⁸ Under the consumer expectations approach, a product is defective if it failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.²⁰⁹ Under the risk-utility analysis, which is sometimes called a risk-benefit test,²¹⁰ a product is defective as designed if the degree of foreseeable risk of harm outweighs the utility or other benefits of the product.²¹¹ The risks and benefits of the product are contrasted with the probable risks and benefits of an alternative design.²¹² If the alternative design would have made the product safer without significant lost utility or benefit, then the product will be considered "unreasonably dangerous."²¹³ In the case of an injured occupant of a car suing the manufacturer of the SUV that hit her, the plaintiff is not a consumer of the product, and thus cannot proceed under the consumer expectations approach. Therefore, employing the risk-utility test, the reason-

206. Hakim & Alster, *Lawsuits*, *supra* note 24.

207. *Id.*

208. See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455-56 (Cal. 1978) ("[A] product may be found defective in design . . . under either of two alternative tests. First . . . if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second if . . . the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design."); see also Latin, *Bad Designs*, *supra* note 1, at 1185.

209. *Barker*, 473 P.2d at 455-56.

210. *West v. Johnson & Johnson Prod., Inc.*, 220 Cal. Rptr. 437, 457 (Ct. App. 1985).

211. PROSSER & KEETON ON THE LAW OF TORTS 699 (5th ed. 1984).

212. Latin, *Bad Designs*, *supra* note 1, at 1184-85.

213. *Id.* at 1185; see RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (1998).

ableness of the SUV design will be determined by balancing the risks posed to others by design characteristics such as height, weight, and frame rail design, with the benefits provided by these design characteristics. If the benefits fail to outweigh the risks, when compared with less-risky alternative design characteristics, then the SUV design is unreasonably dangerous.

1. Safer Alternative SUV Designs

A plaintiff injured as the result of an SUV-car collision would likely be required to show that a reasonable alternative design for the SUV would have prevented her injuries.²¹⁴ Such alternative designs clearly exist, and have actually been provided by the auto industry itself. As discussed in Part I of this Note, Ford lowered the frame rails on its model year 2000 Explorer, and added a blocker bar to the Excursion.²¹⁵ These modifications show that such alternatives do exist, and that auto makers have been aware of them for some time. The December 2003 pact also indicated that alternative designs were already in place for some vehicles but not for others.²¹⁶ In addition, IIHS research has concluded that reducing the weight of large SUVs would not affect the safety of their occupants, and would actually provide a “net safety benefit” by saving lives in other vehicles.²¹⁷ Finally, given the availability of NHTSA and IIHS studies on crash compatibility,²¹⁸ litigation discovery might turn up memos reflecting auto makers’ knowledge of the problem, and, possibly, alternative designs that were turned down.

Proving the existence of safer alternative SUV designs will likely be expensive and time-consuming.²¹⁹ Experts will need to be hired, including accident reconstructionists and biomechanical engineers.²²⁰ Discovery battles will not be easily won against auto manufacturers with deep pockets. However, these are practical hurdles that can be overcome, the details of which are outside the scope of this Note.²²¹ The more pressing issue concerns a discussion of the risks and benefits of SUVs.

214. Robert M.N. Palmer & William Petrus, *LTVs: ‘Safer’ at What Cost?*, TRIAL, Jan. 2000, at 44, 50 [hereinafter Palmer & Petrus, *LTVs*].

215. See *supra* notes 131–34 and accompanying text.

216. Hakim & Alster, *Lawsuits*, *supra* note 24.

217. *Comprehensive New Study Lends Perspective to Debates About Fuel Economy and Crash Compatibility*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Mar. 6, 2004, at 4, 6.

218. See *supra* notes 82–83.

219. Palmer & Petrus, *LTVs*, *supra* note 214, at 51.

220. *Id.*

221. For a more detailed discussion of design alternatives, see Latin, *Bad Designs*, *supra* note 1, at 1200–1213, and Palmer & Petrus, *LTVs*, *supra* note 214, at 50–51.

2. The Inconsequential Utility of SUVs

Part I of this Note has discussed the risks posed to other drivers and pedestrians by SUV frame stiffness, frame rail design, height, and weight.²²² This section will address the utility or benefits provided by these SUV characteristics, if any, that would be lost if alternatives to these design features were adopted.²²³

Many consumers buy SUVs because they perceive them to be safer than cars,²²⁴ and the auto industry gladly fosters this perception.²²⁵ Certainly, in the event of a collision with a small car, a large SUV may provide more protection to its occupants (at the expense, of course, of the occupants of the car).²²⁶ However, as the IIHS concluded in a study of crash compatibility, it is “disingenuous for defenders of SUVs to claim they’re safer than cars,” because that protection is simply a result of the sheer mass of an SUV.²²⁷ Moreover, as discussed in Part I, SUVs are actually *less* safe for their occupants than cars.²²⁸ The fact remains that any safety benefits provided in a collision with a smaller vehicle are more than offset by the SUV’s tendency towards rollovers, and by the extra force transferred to the passenger compartment by the stiffness of the SUV’s frame when striking a

222. See *supra* notes 91–110 and accompanying text.

223. See Latin, *Bad Designs*, *supra* note 1, at 1185–86 (discussing the risk-utility balance factors and their application). As noted above, other types of LTVs, particularly full-size pickups, also pose a great danger to others. See *supra* notes 74–78; see also Hakim, *Eclipsing*, *supra* note 48. This Note does not address pickups specifically, because pickups historically served a particular function: their truck beds were used for hauling goods. This specific function distinguishes pickups from SUVs. The result is that pickups have at least some concrete utility to be weighed against any danger posed to others, unlike SUVs, which, as discussed in this section, have no utility. See *infra* notes 224–53 and accompanying text.

Recently, however, many pickup buyers want their trucks to be “more SUV-like”—basically, an SUV with the bonus of a truck bed. Hakim, *Eclipsing*, *supra* note 48. If these vehicles, like SUVs, are indeed used like any passenger car, and not for a functional purpose, than the same analysis will apply to these vehicles as to large SUVs.

224. See *supra* note 60 and accompanying text.

225. Chevy touted the Blazer as “a little security in an insecure world,” see Blazer, <http://www.chevy21.com/blazer.htm> (last visited Sep. 17, 2005), and Chrysler assured buyers that the Jeep Grand Cherokee was “still the best insurance policy out there,” see BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 127. A Chrysler executive admits that the perception that SUVs are better in a crash has been an “important selling point.” BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 108. See also Hakim, *Safety Gap*, *supra* note 48 (noting that industry groups and lobbyists maintain that SUVs are at least as safe as cars).

Fears of terrorism play a role as well. After the terrorist attacks of September 11, 2001, consumer ratings of the Hummer soared. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 401.

226. *Incompatibility of Vehicles in Crashes*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Apr. 26, 2003, at 6 (noting the “advantage in terms of self-protection” enjoyed by SUVs, and the corresponding higher death rates in cars when SUVs collide with them).

227. *Id.*

228. See *supra* notes 62–72 and accompanying text. See also Hakim, *Safety Gap*, *supra* note 48 (occupants of SUVs 11% more likely to die than occupants of cars).

fixed object.²²⁹ Thus, SUVs provide no safety benefits to consumers; any perception of safety is purely illusory.

SUV advertising often touts the off-road abilities of the SUVs, presenting vehicles climbing over boulders and scaling mountains. However, few consumers actually take their SUVs off-road. Automotive market research, in fact, shows that only 1% to 13% of SUV owners claim to go off-road.²³⁰ This percentage varies based on the form of the question because many research respondents are under the impression that “off-roading” means going on any dirt or gravel road, however smoothly graded.²³¹ As Ford’s SUV marketing manager puts it, “The only time those SUVs are going to be off-road is when they miss the driveway at 3 a.m.”²³²

Another common defense of SUVs is their extra space, which SUV owners claim to need for their families.²³³ Indeed, SUVs are now the second-most common way of transporting children, behind minivans.²³⁴ However, minivans often provide the same amount of space and are much safer, considering that a child in an SUV is twice as likely to die as a child in a minivan.²³⁵ Nevertheless, SUV buyers almost never consider buying a minivan instead.²³⁶

The reason is that minivan buyers and SUV buyers are very different people. The auto industry’s own research has found that many SUV buyers tend to be insecure, vain, self-centered, and self-absorbed.²³⁷ A Ford vehicle strategist and market researcher, Jim Brulin, describes the mindset: “It’s about not letting anything get in your way and . . . intimidating others to get out of your way.”²³⁸ Much SUV advertising reflects this desire to intimidate and overpower. Advertisements command us to “yield” to the Esca-

229. See *supra* notes 66–72 and accompanying text.

230. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 113. Public Citizen estimates that only 1% to 10% of SUVs are used off-road or for towing. PUBLIC CITIZEN, HIGH COSTS, *supra* note 64, at 12.

231. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 113.

232. *Id.* (quote of J.C. Collins). SUVs are also defended on the grounds that their four-wheel-drive capabilities are needed in bad weather. Gladwell, *Big and Bad*, *supra* note 5, at 32. This argument is a non-starter. To begin with, four-wheel-drive does nothing to improve braking or turning on slippery surfaces; the only benefit is the ability to accelerate without slipping in deep snow or mud. *Id.* This “benefit” is actually a drawback because it gives the SUV driver a false sense of security, which often causes the driver to go faster and allow less stopping space than is safe. *Id.* Finally, four-wheel drive is available on a host of non-SUV vehicles, which are inherently easier to handle and require less stopping distance. See, e.g., Subaru Outback, http://www.subaru.com/shop/model_consideration.jsp?model=OUTBACK (last visited Sep. 17, 2005).

233. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 108.

234. PUBLIC CITIZEN, HIGH COSTS, *supra* note 64, at 10.

235. *Id.* Minivans ride closer to the ground, mitigating the rollover hazard, and afford their occupants superior crash protection. Cooper, *Attack*, *supra* note 31, at 68.

236. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 108–09.

237. *Id.* at 101.

238. *Id.* at 106.

lade,²³⁹ and promise that the new Lexus SUV arrives “now with added intimidation.”²⁴⁰ The Dodge Durango was designed to resemble a “savage jungle cat.”²⁴¹ One young female SUV driver raves that her SUV “just makes me feel powerful—if someone disses me, I can tailgate the crap out of them.”²⁴²

SUV owners sometimes exhibit a “survival of the fittest” mentality.²⁴³ Clotaire Rapaille, an anthropologist who has advised Chrysler, Ford, and General Motors on SUV consumer preferences, has concluded that SUVs reflect a “reptilian desire for survival.”²⁴⁴ American consumers, he says, increasingly fearful of crime and the threat of violence, want “armored cars for the battlefield” they perceive to be around them.²⁴⁵ Since the terrorist attacks of September 11th, 2001, it is not hard to imagine that these fears have deepened.²⁴⁶ Unfortunately, however, a by-product of SUV owners’ instinctual desire for survival is a willingness to put other drivers at risk in order to enhance their own safety.²⁴⁷ Rapaille maintains that many buyers choose SUVs because they believe the SUV will demolish a smaller car in a collision, thinking, “[i]f there’s a crash, I want the other guy to die.”²⁴⁸ More than just desiring safety, it seems, some SUV owners are comfortable with that safety—illusory as it is—coming at the expense of others.

In addition to a desire for protection, David Bostwick, Chrysler’s market research director, contends that people buy SUVs in order to gain a feeling of control over the people and situations around them.²⁴⁹ Similarly, a General Motors executive, discussing the difference between minivan and SUV buyers, believes that while minivan drivers want to control the operation of their vehicle, SUV drivers want to control other people.²⁵⁰ Providing that feeling of “command control” is the reason that manufacturers mount SUV seats so high, even though that height contributes to both roll-

239. *Id.* at xix–xx.

240. *Id.* at 111.

241. *Id.* at 99.

242. *Id.* at 342.

243. Cooper, *Attack*, *supra* note 31, at 67; *see also In Collisions with Cars, SUVs Are Incompatible. Are SUVs That Are Bigger and Heavier Posing Even More Risks?*, STATUS REPORT (Ins. Inst. for Highway Safety, Arlington, Va.), Apr. 28, 2005, at 4 (displaying a cartoon referring to a large SUV as a “S.D.V.”—“Social Darwinist Vehicle”).

244. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 95–96.

245. *Id.* at 95–97.

246. *See supra* note 225.

247. BRADSHER, HIGH AND MIGHTY, *supra* note 1, at 100.

248. *Id.*

249. *Id.* at 108.

250. *Id.* at 104.

overs and vehicle incompatibility.²⁵¹ This desire for empowerment cuts across gender lines as well. John Wolkonowicz, an auto design and marketing consultant at Arthur D. Little, concluded that while men buy powerful SUVs to compensate for a feeling of lost masculinity, “women are enjoying flaunting the power they’ve achieved.”²⁵²

In short, SUVs offer little utility beyond a psychological benefit to their owners. The feeling of empowerment, protection, and control resulting from SUV size, mass, and height is purely personal to the driver of the SUV. Weighed against the litany of lethal injury and catastrophic damage that these characteristics of SUV design cause to pedestrians and the occupants of other vehicles, such a mere “feel-good” benefit cannot possibly be justified.²⁵³

III. LITIGATING SUV DRIVING AS AN ULTRAHAZARDOUS ACTIVITY

In addition to litigating the dangers of SUVs as a design defect under a products liability approach, plaintiffs have another option: to argue that driving an SUV is an “ultrahazardous” or “abnormally dangerous” activity. Under this approach, the driver of the SUV would be subject to strict liability for any injuries to nonoccupants resulting from a collision with another vehicle or a pedestrian, regardless of who was at fault.

At first glance, this argument might seem implausible. After all, strict liability for routine traffic accidents, and with it the notion that driving was ultrahazardous, was dismissed by courts early in the twentieth century. However, as has been discussed in Part I of this Note, SUVs create risks to others far above and beyond the usual risks created by passenger cars. This is particularly true for “behemoth” SUVs like the Hummer and the new CTX. As SUVs continue to get larger, heavier, stiffer, and higher, they have become so dangerous to others that strict liability is justified.

This section will discuss the doctrine of ultrahazardous strict liability, and how it could relate to SUVs. The discussion will begin with an overview of the doctrine, the role of the Restatements, and the principles drawn from several decades of cases. Next, SUVs will be discussed in light of

251. *Id.* Another reason for the extra height of SUVs is even less substantial. SUV roof height is the same as that of large pickups; the reason, said Ford’s truck engineering director, for the extra height is to allow Texans to wear their cowboy hats while driving. *Id.* at 245.

252. Bradsher, *Domination*, *supra* note 32.

253. In fact, putting others at risk to obtain such a purely private benefit often leads to the imposition of punitive damages. *See, e.g., Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981) (upholding an award of punitive damages where Ford could have fixed, at minimal cost, a defect in the Pinto which it knew could cause serious injury or death, but where Ford instead engaged in a cost-benefit analysis and chose to protect its profits).

those principles. Correctly understood, ultrahazardous strict liability for SUVs is a plausible alternative, one that is justified under both the Restatement (Second) of Torts and traditional principles of ultrahazardous strict liability.

A. *An Overview of Ultrahazardous Strict Liability*

The default rule of liability for unintentional injuries is negligence.²⁵⁴ However, some pockets of strict liability exist as exceptions to the general rule. A common example is the law of trespass, under which the trespasser is strictly liable for damages, no matter how justifiable and non-negligent the intrusion.²⁵⁵ Another is the statutory scheme of Workers' Compensation laws, under which an injured worker need not prove negligence on the part of her employer.²⁵⁶ Strict liability is also applied to manufacturing defects in products liability cases.²⁵⁷ One of the more intriguing strict liability doctrines is strict liability for ultrahazardous activities, recognized by English courts in the landmark case of *Fletcher v. Rylands*.²⁵⁸ The broad idea behind the doctrine is that strict liability is justified because some activities, even if carried on with all reasonable care, are so inherently dangerous that those who engage in them should be liable to nonparticipants for any injuries resulting from a loss of control of the activity.²⁵⁹

1. Early History: *Fletcher v. Rylands* and its Adoption in the United States

In *Fletcher v. Rylands*, the defendant mill owner built a reservoir on his land, unaware of a network of ancient coal mining shafts under the property; when he filled the reservoir, the shafts flooded, with the flood eventually spreading to the plaintiff's adjoining coal mines.²⁶⁰ Justice Blackburn, holding the defendant liable for damages despite the defendant's lack of negligence, articulated a theory of strict liability:

254. *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) ("The baseline common law regime of tort liability is negligence.").

255. *See, e.g., Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

256. *See Joseph H. King, Jr., A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 385-86 (1996) [hereinafter King, *Goals Approach*].

257. *See Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972).

258. 1 L.R. Exch. 265 (1866), *aff'd*, *Rylands v. Fletcher*, 3 L.R.E. & I. App. 330 (H.L. 1868).

259. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977) ("The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.").

260. *Rylands*, 3 L.R.E. & I. App. at 332.

the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.²⁶¹

American courts initially rejected Blackburn's "true rule," fearing impediments to progress in a rapidly industrializing nation.²⁶² Reflecting the prominence of the no-liability-without-fault ideal, New York's highest court declared, "[T]he rule is . . . [with] no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part."²⁶³ Courts were likely concerned that subjecting industry to excessive liability would stifle economic growth—a familiar American refrain.²⁶⁴

Nonetheless, by the early part of the twentieth century, courts in the U.S. began to adopt the *Rylands* rule, holding defendants liable for injuries caused by certain activities even in the absence of negligence. Typical early cases involved the storing of nitroglycerin,²⁶⁵ exploding oil wells,²⁶⁶ and blasting operations.²⁶⁷ The reasoning behind the imposition of strict liability in these cases was two-fold: first, a recognition of the inherent dangerousness of certain activities;²⁶⁸ second, a concern that those injured by the activity were not only unable to protect themselves, but had no relation to the risky activity other than the fact that they were injured by it.²⁶⁹ For example, in *Exner v. Sherman Power Construction*, the plaintiff was injured, and her house damaged, by the concussion of exploding dynamite that had been stored on nearby property.²⁷⁰ Adopting the rule of *Rylands*, Judge Augustus Hand wrote,

When, as here, the defendant, though without fault, has engaged in the perilous activity of storing large quantities of a dangerous explosive for use in his business, we think there is no justification for relieving it of liability, and that the owner of the business, rather than a third person who

261. *Fletcher*, 1 L.R. Exch. at 279. Upon appeal to the House of Lords, Justice Blackburn's opinion was affirmed, with additional language which referred to the defendant's "non-natural use" of his land. *Rylands*, 3 L.R.E. & I. App. at 339.

262. *See, e.g., Brown v. Collins*, 53 N.H. 442, 448 (1873) (holding that no "legal principle can throw so serious an obstacle in the way of progress and improvement").

263. *Losee v. Buchanan*, 51 N.Y. 476, 491 (1873).

264. *See Virginia E. Nolan & Edmund Ursin, The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 262 (1987) [hereinafter Nolan & Ursin, *Revitalization*].

265. *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 54 N.E. 528, 531 (Ohio 1899).

266. *Green v. Gen. Petroleum Corp.*, 270 P. 952 (Cal. 1928).

267. *Asheville Const. Co. v. S. Ry. Co.*, 19 F.2d 32 (4th Cir. 1927).

268. *See Bradford*, 54 N.E. at 531.

269. *See Exner v. Sherman Power Const. Co.*, 54 F.2d 510, 514 (2d Cir. 1931).

270. *Id.* at 511.

has no relation to the explosion, other than that of injury, should bear the loss.²⁷¹

In short, courts were beginning to recognize that in cases where defendants had engaged in inherently risky activities, the imposition of strict liability for injuries to those who neither engaged in nor sought to benefit from the activity was justified on principles of fairness and good public policy. The California Supreme Court, explaining its holding in the 1928 case of *Green v. General Petroleum*, in which plaintiff had been injured from debris from a neighbor's exploding oil well, stated, "The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy."²⁷² In *Green*, the court had used a "fairness" rationale even more explicit than the court used in *Exner*, stating,

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act . . . and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, *in all fairness*, be required to compensate the other for the damage done.²⁷³

One would think that with the growth of industry, technology, and their accompanying dangers, courts since *Green* and *Exner* would have greatly expanded the doctrine of strict liability for hazardous activities. Certainly, "perilous" activities such as the storing of dynamite or oil drilling seem tame compared to today's shadowy and unpredictable threats of toxic waste, radioactive materials, and explosive chemicals that can be bought off the shelf in the hardware store. However, with the promulgation of the Restatement (First) of Torts in the 1930s and the Restatement (Second) in the 1960s and 70s, the expansion of the doctrine has been uneven, and its application unpredictable.²⁷⁴ Both Restatements added restrictive criteria to the doctrine, which tended to limit it to a narrow class of cases.²⁷⁵

271. *Id.* at 514.

272. *Luthringer v. Moore*, 190 P.2d 1, 8 (Cal. 1948) (discussing *Green v. Gen. Petroleum*, 270 P. 952 (Cal. 1928)).

273. *Green v. Gen. Petroleum Corp.*, 270 P. 952, 955 (Cal. 1928) (emphasis added).

274. See Nolan & Ursin, *Revitalization*, *supra* note 264, at 265, 267.

275. *Id.* at 267, 270.

2. First Restatement: Exempting Activities of "Common Usage"

The Restatement (First) of Torts provided for strict liability for "ultra-hazardous" activities.²⁷⁶ An "ultrahazardous" activity was defined in the Restatement (First) as one which "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."²⁷⁷ Thus, the Restatement (First) added a new restriction that had been missing from *Rylands* and the early "ultrahazardous" cases discussed above: all activities of "common usage" were now excluded from strict liability. Not only would this exempt activities such as driving and operating railroads, but it could have mandated a different result in cases like *Green* (oil drilling) and *Exner* (storing explosives), where the activities involved were at least not uncommon.²⁷⁸ By excluding activities of "common usage" from strict liability, the Restatement assured that the doctrine of strict liability for ultrahazardous activities would have little practical significance.²⁷⁹

At least one court, however, circumvented the Restatement's "common usage" restraint. In *Luthringer v. Moore*, decided in 1948, the California Supreme Court extended strict liability for ultrahazardous activity to pest control.²⁸⁰ There, the defendant had sprayed for cockroaches in the basement of a restaurant around midnight.²⁸¹ The gas leaked through to the basement of the pharmacy next door, and the following morning, the plaintiff, a pharmacy employee, was knocked unconscious by the fumes.²⁸² Quoting the Restatement (First), the court found that the fumigation was an "ultra-hazardous activity."²⁸³ The court concluded, however, that spraying for cockroaches was not an activity of "common usage."²⁸⁴ The court did this by defining the activity in the narrowest possible terms, as one carried out only by professional fumigators, who it said were "few in number."²⁸⁵

276. RESTATEMENT (FIRST) OF TORTS § 519 (1938) ("[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.").

277. *Id.* § 520.

278. See *supra* notes 260–273 and accompanying text.

279. Nolan & Ursin, *Revitalization*, *supra* note 264, at 267.

280. 190 P.2d 1 (Cal. 1948).

281. *Id.* at 3.

282. *Id.*

283. *Id.* at 7.

284. *Id.* at 8.

285. *Id.*

Thus, the court in effect “defined out” the activity so that it would not be one of “common usage.”

3. Second Restatement: Confusion and a Quasi-Negligence Test

The Second Restatement adopted a different framework.²⁸⁶ The first change was largely cosmetic, replacing “ultrahazardous” with “abnormally dangerous.”²⁸⁷ While holding to the idea that strict liability would attach to the abnormally dangerous activity,²⁸⁸ the Restatement (Second) defined “abnormally dangerous” by listing six factors to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.²⁸⁹

The first four factors are generally derived from the Restatement (First), while (e) and (f) are new. While the additional factors would appear to make the definition of “abnormally dangerous” even more restrictive than was “ultrahazardous” in the Restatement (First), the test lacks teeth because these are only factors to be considered, rather than required elements.²⁹⁰ Not all factors have to be fulfilled for an activity to be abnormally dangerous.²⁹¹ Furthermore, factor (c) appears to loosen the test by replacing “utmost care” in the Restatement (First) with “reasonable care.”²⁹² Similarly, factor (d), the “common usage” factor, instructs courts to merely consider the “extent to which” the activity is not common usage,

286. RESTATEMENT (SECOND) OF TORTS §§ 519–520 (1977).

287. *Id.* According to the drafters, “a combination of the factors . . . is commonly expressed by saying that the activity is ‘ultrahazardous,’ or ‘extra-hazardous.’” *Id.* § 520 cmt. h. This Note uses the terms “abnormally dangerous” and “ultrahazardous” interchangeably.

288. *Id.* § 519.

289. *Id.* § 520.

290. *Id.* § 520 cmt. f. The drafters instructed,

In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition.

Id.

291. *Id.*

292. *Id.* § 520.

rather than categorically excluding common activities.²⁹³ At first blush, then, the first four factors might seem to lessen the burden on the plaintiff trying to pursue strict liability for ultrahazardous, or abnormally dangerous, activities.

However, factors (e) and (f) inject new variables. Factor (e) instructs courts to consider whether the dangerous activity was appropriate to its location, something that was entirely absent from the Restatement (First).²⁹⁴ Factor (f) directs courts to balance the risks of the dangerous activity against its "value to the community." Taken together, these factors suggest, rather than a strict liability rule, a risk-utility balancing and reasonableness test, similar to a negligence test.²⁹⁵ Some courts have criticized or rejected the Restatement (Second) precisely because of these two factors.²⁹⁶

For example, in *Koos v. Roth*, the Oregon Supreme Court in 1982 flatly rejected factors (e) and (f) while holding that a farmer burning his fields was strictly liable for the damage caused to a neighbor when the fire spread.²⁹⁷ Acknowledging the "appropriateness" of agricultural field burning to its location, the court explicitly declined to follow factor (e), stating that "an activity is not otherwise immune from strict liability because it is 'appropriate' in its place."²⁹⁸ Similarly, the court found "value to the community" to be irrelevant to the concept of strict liability.²⁹⁹ The proper inquiry, the court held, was not a subjective evaluation of the activity's economic or other societal importance, but rather "who shall pay for harm that has been done."³⁰⁰ The court found it illogical that the costs of the activity should be borne by others simply because the activity was valuable.³⁰¹

293. *Id.*

294. *Id.* The source of this factor appears to be Lord Crain's opinion in *Rylands v. Fletcher*, which referred to the defendant's "non-natural" use of his land. 3 L.R.E. & I. App. 330, 339 (H.L. 1868). The drafters' comments refer to the "English cases" and "non-natural use" of land. RESTATEMENT (SECOND) OF TORTS § 520 cmt. j.

295. See *Yukon Equip. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1211 (Alaska 1978) ("Such factors suggest a negligence standard."); DOBBS, *THE LAW OF TORTS* 952-53 (West 2000) ("[T]hese factors look like a poorly disguised negligence regime."); Nolan & Ursin, *Revitalization*, *supra* note 264, at 272-73.

296. See, e.g., *Koos v. Roth*, 652 P.2d 1255 (Or. 1982); *Yukon*, 585 P.2d at 1211.

297. 652 P.2d at 1261, 1263.

298. *Id.* at 1263.

299. *Id.* at 1262.

300. *Id.*

301. *Id.*

Koos emphasized that the focus should be on evaluating the dangerousness of the activity itself, by assessing both the probability and the magnitude of the threatened harm.³⁰² Thus,

"[i]f the consequences of a mishap are potentially lethal or highly destructive of health or property, a slight likelihood that they will occur suffices. . . . Conversely . . . even when the risk 'only moderately threatens economic activities rather than harm to life, health, or property or environment,' the activity may carry strict liability if the consequences are highly probable"³⁰³

The determination of whether an activity is ultrahazardous is thus based on "the magnitude of harmful events and their probability despite all reasonable precautions"³⁰⁴

Remarkably, the court not only rejected the "value to the community" factor, but in explaining why, reached back beyond the Restatement (First) to *Exner*. The court approvingly quoted Judge Hand's rationale that the person carrying on the risky activity, rather than the victim who had no relation to the activity other than being injured by it, should bear the loss.³⁰⁵ The *Koos* court elaborated that "the person conducting the activity can choose whether or not to chance the potentially costly consequences . . . [but] the potential victim cannot make that choice."³⁰⁶

Finally, the court in *Koos*, like the court in *Lothringer*, circumvented the "common usage" factor through its definition of the activity. Instead of "fire," which would of course be an activity of "common usage," the court referred to the defendant's fire as agricultural "field burning," which is not carried out by most people, nor even by most farmers.³⁰⁷ However, the court did recognize that the technique is "widely employed for certain kinds of crops."³⁰⁸ Clearly, the court did not attach much significance to the "common usage" factor once it had considered the magnitude of the risks posed by field burning.³⁰⁹

302. *Id.* at 1260.

303. *Id.* at 1260-61.

304. *Id.* at 1261.

305. *Id.* at 1262.

306. *Id.* at 1262-63.

307. *Id.* at 1265.

308. *Id.*

309. Courts have defined activities so as to fit or not fit "common usage" in wildly inconsistent ways. For instance, in *Doe v. Johnson*, the plaintiff claimed that her sex partner engaged in ultrahazardous activity because he had sex with her when he had AIDS. 817 F. Supp. 1382, 1385 (W.D. Mich. 1993) (applying Michigan law). The court decided that "[s]exual activity is not an uncommon endeavor," and dismissed the claim. *Id.* at 1398. A better definition of the activity, however, would have been "sexual activity while carrying the AIDS virus," which would probably have led to a different conclusion.

The Supreme Court of Alaska also preferred *Exner* to the Restatement (Second). In *Yukon Equipment v. Fireman's Fund Insurance*, a case involving the explosion of stored explosives, the court declared, "[W]e do not believe that the Restatement (Second) approach should be used. . . . Instead, we adhere to the rule of *Exner*"³¹⁰ The court felt that the Restatement's process of weighing degrees of risk, difficulty of eliminating risk, and appropriateness of place "suggest a negligence standard."³¹¹ Like *Koos*, the *Yukon* court relied on Judge Hand's fairness rationale: "As between those who have created the risk for the benefit of their own enterprise and those whose only connection with the enterprise is to have suffered damage because of it, the law places the risk of loss on the former."³¹²

Other courts, while not expressly rejecting the Restatement, have circumvented one or more of the six factors. In *Siegler v. Kulhman*, the victim perished when she drove through a flaming pool of gasoline that had spilled when the defendant's gasoline trailer had disengaged and rolled down a hill.³¹³ The Supreme Court of Washington, finding no error in the jury's verdict that the defendant had not been negligent, nonetheless applied strict liability.³¹⁴ The court began its analysis by quoting Blackburn's "true rule."³¹⁵ Then, before mentioning either Restatement, the court discussed why the transportation of gasoline on the highways justified "application of the *Rylands v. Fletcher* rule."³¹⁶ The court emphasized the nature of risks posed by the tanker, referring to the "uniquely hazardous characteristics" and "extraordinary dangers deriving from sheer quantity, bulk and weight, which enormously multiply its hazardous properties."³¹⁷ Next, the court, as in the cases above, discussed fairness, "putting the burden where it should belong as a matter of abstract justice, that is, upon the one of the two innocent parties whose acts instigated or made the harm possible"³¹⁸ Having thus decided the issue on the basis of the dangerousness of the activity and fairness to the victim, the court quoted the Restatement (Second) almost as an afterthought.³¹⁹ Without discussing any of the six factors specifically, the court declared that "hauling gasoline as

310. 585 P.2d 1206, 1211 (Alaska 1978).

311. *Id.*

312. *Id.* at 1212.

313. 502 P.2d 1181, 1182 (Wash. 1972).

314. *Id.* at 1184.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 1185.

319. *Id.* at 1186-87.

cargo is undeniably an abnormally dangerous activity and on its face possesses all of the factors necessary for imposition of strict liability as set forth in the Restatement”³²⁰

Clearly, the court gave little or no weight to “common usage,” “appropriateness to the location,” or “value to the community.” All were present here: carrying gas in on the highway is common (even if defined as transporting it in tankers); the location was appropriate (where else but the highway could this be done?); and certainly, the delivery of gasoline to stations has value to the community. The fact that the court imposed strict liability in the face of three of the six factors weighing against it implies that the court did not feel restricted by the approach of the Restatement (Second).³²¹

Four years later, the same court, applying strict liability in a crop dusting case, exhibited similar disregard for the six factors. In *Langan v. Valicopters*, the defendant’s pesticides landed on a neighbor’s organic farm, leading to the revocation of the plaintiff’s organic food license.³²² Claiming to have “adopted” the Restatement (Second) in *Siegler*,³²³ the court declared that “each test of the Restatement is met.”³²⁴ However, the court’s own analysis of the factors belies this assertion. For the “common usage” factor, the court concluded that crop dusting was not common, despite acknowledging “the prevalence of crop dusting,” the fact that it is “ordinarily done in large portions of the Yakima Valley,” and that 287 aircraft were used to for crop dusting in that valley in 1975.³²⁵ Similarly, for the “appropriateness to location” factor, the court simply declared that crop dusting was inappropriate,³²⁶ ignoring the obvious fact that crop dusting was entirely appropriate in a farming community.³²⁷ Finally, for the “value to the community” factor, the court freely admitted that pesticides are “socially valuable” and “benefit society,” but disregarded this entirely.³²⁸ The court returned to the idea of fairness: “[W]e must ask who should bear the loss caused by the pesticides.”³²⁹

320. *Id.* at 1187.

321. Nolan & Ursin, *Revitalization*, *supra* note 264, at 274–75.

322. 567 P.2d 218, 219–20 (Wash. 1977).

323. *Id.* at 221 (citing *Siegler*, 502 P.2d 1181).

324. *Id.* at 222.

325. *Id.* at 223.

326. *Id.*

327. Nolan & Ursin, *Revitalization*, *supra* note 264, at 276.

328. *Langan*, 567 P.2d at 223.

329. *Id.*

At least one court has even more explicitly disregarded the "common usage" factor. In a recent toxic tort case³³⁰ in the Virgin Islands, the defendants' underground service station tanks had leaked into the St. Thomas water supply.³³¹ Holding that the storage of gasoline tanks above an aquifer was an abnormally dangerous use of land that allowed the imposition of strict liability, the U.S. district court freely acknowledged that the operation of gas stations, even in residential areas, is an activity of "common usage."³³² However, the court brushed this aside, focusing instead on the magnitude of this risk, which had in fact led to the contamination of the island's most productive source of water.³³³ In fact, once such extreme danger had been established, all the other Restatement factors fell into place: there could be no appropriateness of location, no value to the community, and no way to eliminate the risk.³³⁴ The nature of the risk, combined with the fact that the victims had no notice or opportunity to prepare for it, was sufficient for strict liability.³³⁵

B. Principles and Misconceptions of Ultrahazardous Strict Liability

1. Fairness

The above cases illustrate that while courts may pay lip service to the Restatements when considering ultrahazardous or abnormally dangerous activity cases, the true basis of the decision often rests on different principles. Two basic themes emerge from the cases discussed above. The first is a willingness to look beyond Restatement constraints such as "common usage," "appropriateness to location," and "value to the community," and instead focus on the nature of the risks and dangers posed by the activity.³³⁶ The second is the idea of fairness.³³⁷ Both of these themes have particular significance in considering whether driving a SUV can be an ultrahazard-

330. Many modern ultrahazardous cases involve toxic waste. See, e.g., *Dep't of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150, 160 (N.J. 1983); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1545 (10th Cir. 1992); *Albahary v. City & Town of Bristol*, 963 F. Supp. 150, 156 (D. Conn. 1997).

331. *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1269 (D.V.I. 1993) (applying Virgin Islands law).

332. *Id.* at 1269-70.

333. *Id.* at 1269.

334. *Id.* at 1270.

335. See King, *Goals Approach*, *supra* note 256, at 369 (discussing the court's reasoning in *Tutu Wells*).

336. See, e.g., *Siegler v. Kulhman*, 502 P.2d 1181, 1184 (Wash. 1972).

337. See King, *Goals Approach*, *supra* note 256, at 359; Nolan & Ursin, *Revitalization*, *supra* note 264, at 290.

ous activity. The first has been discussed above, and its implications as to SUVs will be discussed below. The second requires some elaboration.

As noted in the cases above, courts in ultrahazardous cases have often justified strict liability by a fairness rationale, contrasting the risks and rewards of the dangerous activity as to those carrying it out with the risks to those injured by it. One component of the fairness rationale involves a comparison of the risk-creating activity of the defendant with the relative passivity of the plaintiff. In *Exner* and *Yukon*, for example, the courts emphasized that the plaintiffs had no relation to the activity, other than being injured by it.³³⁸ *Koos* noted that the defendant could choose whether or not to engage in the risky activity, whereas the plaintiff could not.³³⁹ Essentially, strict liability is appropriate under this rationale because the defendant's activity involves one-sided risk creation, where the plaintiff who is injured by the activity creates no similar risk and indeed is powerless to affect the risks created.³⁴⁰ Indeed, Justice Blackburn articulated this principle in *Rylands*: "[T]here is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which defendants should choose to apply their land."³⁴¹

Another component of the fairness rationale contrasts the plaintiff's lack of relation to the activity with the defendant's profiting from it.³⁴² *Yukon* compared the victim's lack of relation to the stored explosives with the defendant's "benefit of their own enterprise."³⁴³ *Langan* was more blunt: because the crop-dusting and farming defendants "will all profit from the continued application of pesticides," they must be "made to pay for the consequences of their acts."³⁴⁴ Thus, instead of the Restatement (Second)'s "value to the community" factor, these cases suggest an inverse

338. *Exner v. Sherman Power Const. Co.*, 54 F.2d 510, 514 (2d Cir. 1931); *Yukon Equip. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1212 (Alaska 1978).

339. *Koos v. Roth*, 652 P.2d 1255, 1262-63 (Or. 1982).

340. Nolan & Ursin, *Revitalization*, *supra* note 264, at 290-91. See also George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 546-49 (1972) [hereinafter Fletcher, *Fairness*] (arguing that that strict liability for ultrahazardous activities is justified under the principle of "nonreciprocal risk-taking," where the victim has not engaged in any reciprocal risk-creating activity, beyond those "innocuous" risks "to which all members of the community contribute in roughly equal shares"); William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1751 (1992) ("The case for strict liability is strongest when one party, the injurer, controls the instrumentality of harm, and the other, the victim, is essentially passive.").

341. *Fletcher v. Rylands*, 1 L.R. Exch. 265, 287 (1866).

342. This component of the rationale is consistent with strict liability for product liability. See RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 27 (1980) ("[A]s against an innocent plaintiff who has nothing to do with the creation of the harm in question, it is only too clear that the defendant who captures the entire benefit of his own activities should, to the extent the law can make it so, also bear its entire costs.").

343. *Yukon*, 585 P.2d at 1212.

344. *Langan v. Valicopters*, 567 P.2d 218, 223 (Wash. 1977).

"value to the defendant" factor, which is held against, not in favor of, the defendant.³⁴⁵ The end result, as articulated by the Washington Supreme Court in *Siegler*, involves a quasi-instinctual "putting the burden where it should belong."³⁴⁶

2. Misconceptions of "Inability to Eliminate the Risk"

Before turning to the question of whether driving an SUV is ultrahazardous, the issue of "inability to eliminate the risk" must be addressed. When evaluating the risky nature of an allegedly ultrahazardous activity, one of the factors used by the Restatement (Second) to define "abnormally dangerous" is the "inability to eliminate the risk by the exercise of reasonable care."³⁴⁷ This use of the "reasonable care" language of negligence law can lead to a fundamental misconception of ultrahazardous strict liability. The problem is that the risk of an activity can be viewed in two different ways. Consider *Fletcher v. Rylands*, the case that originated the doctrine: was the risk in that the water in the reservoir was *likely* to escape, or was the risk in that the water would cause great damage *if* it escaped? Lord Blackburn answered the question: "likely to do mischief if it escapes."³⁴⁸ The difference is crucial. If an activity is considered ultrahazardous because it is hard to prevent its escape, then the inquiry will always begin by considering whether or not the defendant used the proper standard of care in (unsuccessfully) preventing the escape. Then the proper standard of care will be have to be determined, which leads to a circular inquiry, as the more dangerous the activity, the higher the standard of care. This analysis simply misses the point. The purpose of ultrahazardous strict liability is not to determine whether the defendant was negligent. It simply does not mat-

345. Nolan and Ursin, in fact, suggest that the fact that the defendant created the risks in the course of "commercial activity" should be a deciding factor in ultrahazardous strict liability cases. Nolan & Ursin, *Revitalization*, *supra* note 264, at 297-304. However, there is no principled reason to limit this concept to activities carried on for monetary profit. If the gain to the defendant is purely psychological, rather than monetary, there should be even less justification for the risk created to the innocent plaintiff.

346. *Siegler v. Kulhman*, 502 P.2d 1181, 1185 (Wash. 1972).

347. See RESTATEMENT (SECOND) OF TORTS § 520(c) (1977). This was a change from the Restatement (First), which required the plaintiff to prove an inability to eliminate the risks through "utmost care." See RESTATEMENT (FIRST) OF TORTS § 520 (1938). The drafters justified the change from "utmost care" by stating that there was "probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions" RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977). This is a questionable proposition. Every activity, however innocuous and however many precautions are taken, creates at least some, even infinitesimal, risk.

In any event, it is immaterial whether the standard is "utmost care" or "reasonable care." As discussed in this section, the proper focus in an ultrahazardous strict liability analysis is on the risks posed by the activity, rather than on the defendant's standard of care. See *infra* notes 348-59 and accompanying text.

348. 1 L.R. Exch. 265, 279 (1866).

ter whether he was or not. The “ultrahazardousness” of the activity does not depend on its likelihood of “escape,” which in turn depends on the defendant’s care; rather, the activity is “ultrahazardous” because of the “mischief” it will cause if it gets out.

As a result of this misconception, some courts have interpreted factor (c) of the Restatement (Second) to mean that ultrahazardous strict liability applies *only* when a plaintiff has first proved that a defendant has been non-negligent.³⁴⁹ For example, in *Indiana Harbor Belt Railroad v. American Cyanamid Co.*, a railroad tank car containing the highly toxic chemical acrylonitrile leaked and spilled.³⁵⁰ The Seventh Circuit Court of Appeals reversed the district court’s strict liability holding.³⁵¹ The court reasoned that the plaintiff had failed to prove that the defendant railroad had not been negligent; thus, there was no need to “switch” to strict liability.³⁵² The court decided that the dispositive question was, “how likely is this type of accident if the actor uses due care?”³⁵³ This was the wrong question. The right question would have been, “what happens when acrylonitrile gets out, *regardless* of whether the defendant used due care?”

Choosing to focus on the defendant’s level of care leads to an absurd result. If an activity is ultrahazardous when the defendant is *not* negligent, then how can the activity become *less* hazardous if the defendant *is* negligent? The hazards of the activity itself remain the same, no matter what the defendant does. The court in *Siegler* understood this. There, someone’s negligence had obviously caused the gasoline tanker to disconnect from the truck.³⁵⁴ However, not only was the *defendant’s* probable negligence immaterial, but the court disregarded *anyone’s* negligence. In light of the risks posed by hauling gas on the highway, the court disregarded “the negligence of third parties, . . . latent defects in the highways and streets, . . . [and] all of the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight.”³⁵⁵ The proper focus was on the extreme danger posed by the gasoline tanker and the damage caused if something were to go wrong, rather than the care used by the defendant.

349. See, e.g., *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1179 (7th Cir. 1990); Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 632–33 (1999).

350. 916 F.2d at 1175.

351. *Id.* at 1183.

352. *Id.* at 1177.

353. *Id.* at 1179.

354. *Siegler v. Kulhman*, 502 P.2d 1181, 1185 (Wash. 1972). Much of the evidence had been destroyed in the explosion, but this factor was not the basis of the court’s decision. *Id.*

355. *Id.* at 1187.

Similarly, in *Laterra v. Treaster*, the court imposed strict liability despite the defendant's obvious negligence.³⁵⁶ There, a woman committed suicide by running her car in a closed garage.³⁵⁷ However, she failed to consider that she was living in a duplex; as a result, the plaintiff in the other half of the house was killed while he slept.³⁵⁸ Undoubtedly, the woman was negligent. However, recognizing that there was no need to force the plaintiff to prove that the defendant had not been negligent, the court held that she had engaged in an abnormally dangerous activity.³⁵⁹ Like the cases discussed above, and unlike *Indiana Harbor Belt*, the court properly focused on the dangers posed by the activity, combined with the victim's utter lack of relation to that activity.

Thus, like the other Restatement factors and restrictions, the defendant's "inability to eliminate the risk" is often misunderstood, misapplied, or ignored altogether. What the above cases show is that some courts have been willing to reject attempts to exclude the application of ultrahazardous strict liability, attempts that exempt activities based on their "common usage," "value to the community," and "appropriateness of location." Instead, these courts have adhered to the principles that led to the adoption of the doctrine in the first place: a recognition of the extraordinary inherent risks of certain activities, combined with an overarching concern of basic fairness to innocent victims injured as a result. It is in light of these principles that the question of whether driving an SUV is ultrahazardous should be considered.

C. *Driving SUVs as an Ultrahazardous Activity*

With the rise of the automobile in the early twentieth century, common law courts in the United States rejected attempts to impose ultrahazardous strict liability on driving.³⁶⁰ As cars became more common and powerful over the years, some courts recognized the limitations and potential unfairness of the negligence-only regime, but were concerned over possible "confusion" and "chaotic" consequences of switching to strict

356. 844 P.2d 724, 731 (Kan. Ct. App. 1992).

357. *Id.* at 726.

358. *Id.*

359. *Id.* at 731.

360. See *Steffen v. McNaughton*, 124 N.W. 1016, 1017 (Wis. 1910) ("[W]e discover nothing in the construction, operation, and use of the automobile requiring that it be placed in the category with the locomotive, ferocious animals, dynamite, and other dangerous contrivances and agencies."); *Jones v. Hoge*, 92 P. 433, 434 (Wash. 1907) ("We do not think that an automobile can be placed in the same category as locomotives, gunpowder, dynamite, and similarly dangerous machines or agencies."); *McIntyre v. Orner*, 166 Ind. 57, 62 (1906) ("There is nothing dangerous in the use of an automobile when managed by an intelligent and prudent driver.").

liability.³⁶¹ Accordingly, the Restatement (Second) of Torts noted that while driving a car carried an “unavoidable risk of serious harm,” it should not be considered abnormally dangerous. The drafters used the “common usage” factor to exempt cars from strict liability.³⁶² However, the drafters added this intriguing caveat:

On the other hand, the operation of a *tank or any other motor vehicle of such size and weight* as to be unusually difficult to control safely, or to be likely to damage the ground over which it is driven, is not yet a usual activity for many people, and therefore the operation of such a vehicle may be abnormally dangerous.³⁶³

Although, as discussed above, this comment misconceives the risk posed by the “tank” (difficulty of control vs. consequences of loss of control),³⁶⁴ this comment demonstrates that the door is open for applying ultrahazardous strict liability to SUVs. Even under the restrictions and possibly misguided factors of the Restatement (Second), strict liability is justified when a vehicle gets so large and heavy that it takes on the attributes of a “tank.” Considering the military origins of vehicles such as the Hummer, and the sheer size and weight of other “behemoth” SUVs like the CTX, it is entirely possible that the “tanks” are already roaming the streets.

1. SUVs Under the Restatement (Second) Factors

As shown above, courts have shown a willingness to explicitly or implicitly reject the approach of the Restatement (Second) to ultrahazardous activities. However, even if SUVs were analyzed under the six factors listed in the Restatement, a strong case exists for imposing strict liability.

a. Factors (a) and (b): The Existence of a High Degree of Risk of Some Harm, and the Likelihood that the Harm that Results from it Will Be Great

These two factors can be analyzed together. As the court said in *Koos*, the dangerousness of the activity is analyzed by assessing both the probability and the magnitude of the threatened harm.³⁶⁵ Essentially, then, the

361. See, e.g., *Maloney v. Rath*, 445 P.2d 513, 514–15 (Cal. 1968). There, in 1968, the California Supreme Court recognized “the growing dissatisfaction with the law of negligence as an effective and appropriate means for governing compensation for the increasingly serious harms caused by automobiles,” and noted that “a court might be tempted” to switch to a strict liability regime. *Id.* Nonetheless, the court declined to do so, absent clear direction from the state legislature. *Id.* at 515.

362. RESTATEMENT (SECOND) OF TORTS § 520 cmt. i (1977) (“[A]utomobiles have come into such general use that their operation is a matter of common usage. This, notwithstanding the residue of unavoidable risk of serious harm that may result even from their careful operation, is sufficient to prevent their use from being regarded as an abnormally dangerous activity.”).

363. *Id.* (emphasis added).

364. See *supra* note 348 and accompanying text.

365. *Koos v. Roth*, 652 P.2d 1255, 1260 (Or. 1982).

analysis under these two factors involves an evaluation of the nature of the risks posed by the activity. Part I of this Note detailed the risks posed to others by SUVs, including statistics showing the carnage resulting when an SUV slams into a car or runs down a pedestrian.³⁶⁶ The magnitude of lethal danger is high, and with the growing popularity of large SUVs such as Hummers and the new CTX,³⁶⁷ the probability of such harm continues to increase.

b. Factor (c): Inability to Eliminate the Risk by the Exercise of Reasonable Care

One argument against imposing strict liability might be that the SUV risks can be eliminated as long as the driver is non-negligent, i.e., as long as the driver does not cause an accident. This argument fails for two reasons. First, the magnitude of the SUV risk is such that the dangers exist regardless of who is at fault. For instance, if a Honda Civic runs a red light and is broadsided by a Ford Excursion, it does not matter if the Excursion's driver had the green light and was going only twenty-five miles per hour. The resulting chance of injury or death to the Civic occupants is many times what it would have been had the SUV been another passenger car. Second, the fact of modern driving is that accidents happen. In *Larsen*, discussed in Part II of this Note, the crucial element of the court's reason for holding an auto manufacturer liable for enhanced injuries was that accidents are "clearly foreseeable" and "statistically inevitable."³⁶⁸ Similarly, the court in *Siegler* declared that it would have imposed strict liability on the driver of the gasoline tanker even if the tanker had detached due to "negligence of third parties" or defects in the road.³⁶⁹ The reason was nothing more than the "extraordinary dangers deriving from [the] sheer quantity, bulk and weight" of the tanker full of gas.³⁷⁰ In short, the driver of that Excursion could be the most careful, conscientious driver in America, and the extraordinary risks posed by his choice of vehicle would remain undiminished.

366. See *supra* notes 73–126 and accompanying text.

367. See *supra* notes 82–85 and accompanying text.

368. *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968).

369. *Siegler v. Kulhman*, 502 P.2d 1181, 1187 (Wash. 1972).

370. *Id.* at 1184.

c. *Factor (d): The Extent to Which the Activity is not a Matter of Common Usage*

As discussed above, courts have both explicitly and implicitly ignored the “common usage” factor.³⁷¹ For instance, in *Tutu Wells*, the court imposed strict liability despite the fact that service stations are commonplace;³⁷² similarly, *Siegler* disregarded the common use of gasoline tankers.³⁷³ Other courts have circumvented the factor by defining a common activity in such a way that it is no longer commonplace. Thus, *Lothringer* turned pest control into “professional fumigation,”³⁷⁴ and in *Koos*, fire became “agricultural field burning.”³⁷⁵

Moreover, an activity of “common usage” becomes ultrahazardous under the right circumstances. For instance, in *Koos*, the court distinguished between everyday backyard burning and agricultural field burning.³⁷⁶ Both activities involved the same basic act of burning leaves and brush, but the field burning created hazards “beyond the ordinary risks associated with common uses of fire.”³⁷⁷ Thus, strict liability for dangerous activities is not limited just to activities entirely *different* from those normally carried on by members of the community; rather, an ordinary activity, carried out in an abnormally dangerous or ultrahazardous manner, can also justify the imposition of strict liability. The drafters of the Restatement (Second) agreed: “[A]bnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances.”³⁷⁸ Thus, driving a car may be an activity of “common usage,” but driving a “tank or any other motor vehicle of such size and weight” is not.³⁷⁹

Driving a Hummer H1 or an International CTX is thus not an activity of “common usage.” As discussed in Part I on this Note, these massive SUVs create risks to passenger cars and pedestrians far above and beyond the risks that are normally associated with other vehicles. Even though the activity itself—driving—is not unusual, the driver’s choice of vehicle turns an everyday activity into one that creates “unusual risks.” Thus, even if a court were to follow the Restatement (Second)’s “common usage” factor—

371. See *supra* notes 307–09, 320–25, 332–33 and accompanying text.

372. In re Tutu Wells Contamination Litig., 846 F. Supp. 1243, 1269–70 (D.V.I. 1993).

373. *Siegler*, 502 P.2d at 1186–87; see *supra* notes 320–21 and accompanying text.

374. *Luthringer v. Moore*, 190 P.2d 1, 8 (Cal. 1948).

375. *Koos v. Roth*, 652 P.2d 1255, 1265 (Or. 1982).

376. *Id.*

377. *Id.*

378. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).

379. *Id.* § 520 cmt. i.

which many do not—large SUVs would not be excluded from ultrahazardous strict liability on that ground.

d. Factor (e): Inappropriateness of the Activity to the Place Where It Is Carried on

Courts like *Koos* reject factor (e) out of hand, recognizing that an activity is not otherwise immune from strict liability because it is “appropriate” in its place.³⁸⁰ Nonetheless, it is worth considering that SUVs are marketed to emphasize their off-road capabilities; in fact, those capabilities are often raised in defense of SUVs.³⁸¹ The “appropriate” place for these vehicles, then, would be somewhere where they could climb boulders or scale mountains, rather than roam city streets and suburban parking lots. If some of the characteristics that make SUVs so dangerous—height and stiffness, for instance—are designed to provide ground clearance for obstacles and enhance off-road toughness, then everyday driving on paved roads is not entirely “appropriate.”

e. Factor (f): The Extent to Which the Activity’s Value to the Community Is Outweighed by Its Dangerous Attributes

As discussed in Part II of this Note with regard to the risk-utility design defect test, SUVs have no value to the community. The “utility” of SUVs consists of little more than a psychological benefit to their owners, a benefit consisting of feelings of power, freedom, control over others, and self-protection. Such utility, even if it had any value to the community, would be overwhelmingly outweighed by the extraordinary dangers of SUVs.

Thus, if determining whether SUVs are abnormally dangerous under the Restatement (Second), all six factors would be fulfilled. This makes a strong case for strict liability, especially because not all six are even needed.³⁸² In fact, courts have imposed strict liability where only three or four factors are present, such as in *Siegler* (disregarding common usage, appropriateness to location, and value to community), or *Tutu Wells* (ignoring common usage and value to community). Thus, even if a court chose to strictly follow the Restatement (Second), strict liability for SUVs is warranted.

380. 652 P.2d at 1263.

381. See *supra* notes 230–32 and accompanying text.

382. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977).

2. SUVs Under Traditional Principles Of Ultrahazardous Strict Liability

As discussed above, many courts have chosen to eschew strict reliance on the Restatement (Second) when imposing strict liability for ultrahazardous activities. These courts rest their decisions on two broad themes: first, a recognition of the extraordinary inherent risks of certain activities; and second, an overarching concern of basic fairness to innocent victims who are injured as a result of an extraordinarily risky activity that they had nothing to do with. In light of these two principles, the case for imposing strict liability for driving an SUV is even stronger than under the Restatement (Second).

Part I of this Note outlined the inherent risks posed by SUVs, and large SUVs in particular. In light of the extraordinary dangers created by these vehicles, it is likely that courts that have found ultrahazardous risks in activities such as pest control fumigation, trailer tankers on the highway, crop dusting, leaky gas tanks, fireworks displays, and car exhaust, would find such inherent risks in an activity as lethal to other drivers and pedestrians as driving a large SUV.

One component of the fairness principle is that victims of the extraordinarily risky activity have no relation to the activity other than being injured by it, and cannot take steps to prevent their injuries.³⁸³ Collision partners of SUVs or pedestrians in an SUV's path have little ability to prevent their injuries or control the situation. There are basically two options. First, one could choose not to drive or walk near streets. This, of course, would be an intolerable infringement upon individual autonomy and liberty. The second option would be to buy one's own mega-SUV. Given that many consumers choose SUVs because they are huge and menacing, these buyers would no doubt want an even bigger one if everyone else began driving SUVs. Then, drivers concerned with being "mowed down"³⁸⁴ by huge SUVs would have to get their own, and the cycle of escalating SUV size and weight would continue with no end in sight. In effect, choosing the second option would lead to an SUV "arms race."³⁸⁵

Another component of the fairness rationale of ultrahazardous strict liability contrasts the plaintiff's lack of relation to the activity or her inability to prevent her injuries with the profit or benefit the defendant derives from it.³⁸⁶ As discussed in Part II of this Note, an SUV driver benefits from his

383. See *supra* notes 338–41 and accompanying text.

384. Levin, *Study Questions Safety*, *supra* note 60.

385. White, *Arms Race*, *supra* note 49, at 333 (labeling the current trend in which drivers replace their cars with SUVs, and then replace those vehicles with even bigger SUVs, a vehicular "arms race").

386. See *supra* notes 342–46 and accompanying text.

choice of vehicle by enjoying the feelings of power, freedom, control over others, and (illusory) self-protection provided by the characteristics of SUV design. A plaintiff who is injured as a result of those dangerous design characteristics enjoys none of this SUV "utility"; the benefit is purely personal to the driver of the SUV. In fact, there is even more justification for holding this psychological benefit against an SUV driver than against defendants who profit financially from their dangerous activity. At least those defendants, by obtaining wealth, can indirectly benefit society by spending it. A Hummer driver, on the other hand, cannot share his benefit; he alone gets to enjoy the feeling of dominance and self-protection.

Professor Fletcher, discussing justifications for ultrahazardous strict liability, provides an apt analogy by contrasting dog ownership to ownership of a wild horse in the city.³⁸⁷ Even though others in the community keep pets, the owner of the wild horse creates risks to others far beyond those created by dogs. Thus, "it seems fair to hold him liable for the results of his aberrant indulgence."³⁸⁸ SUVs are the wild horses in the city. As a matter of basic fairness, so too should a Hummer driver pay for the consequences of his "aberrant indulgence."

CONCLUSION

SUVs create risks to others far above and beyond the usual risks created by driving. In collisions with other vehicles, the other drivers are many times more likely to die. In collisions with pedestrians, an SUV will kill where a car will injure.

The design features of SUVs that lead to such lethal risks foster no utility or value of any consequence. Any marginal benefit provided by these vehicles consists of nothing more than a psychological benefit to their drivers, a feeling of power, control, freedom, and self-protection. This feeling is purely personal to the drivers, and has no value to anyone else in society.

This Note has discussed two possible legal options for dealing with the dangers created by SUVs. The first, litigating SUV design features as a product defect, has been attempted. Although it failed in *De Veer*, similar cases have been settling, indicating that the legal approach is sound. However, there are drawbacks. A successful lawsuit might lead to design changes in the future, but not the present. Millions of defective SUVs would still roam the highways, in ever-deteriorating condition, with prices

387. Fletcher, *Fairness*, *supra* note 340, at 547-48.

388. *Id.* at 548.

decreasing to the point at which a reckless eighteen-year-old could buy one with money saved from a fast-food job. Successful suits could cost Ford and General Motors a substantial amount of money, might make some lawyers and plaintiffs rich, and could lead to safer future design choices. However, little would be done to ameliorate the clear and present dangers of SUVs.

The ultrahazardous activity approach would have a more immediate impact. A successful suit against an SUV driver, or the driver's insurance company, would immediately change the way consumers choose their vehicles. Insurance companies, instead of rewarding large SUVs for killing rather than merely maiming others, would be forced to hike SUV premiums considerably. Individual cases would sort out which SUVs are ultrahazardous and which are not. The insurance premiums, however, would likely go up across the board, creating a strong disincentive to anyone considering an SUV purchase. In the face of dwindling demand, auto manufacturers would significantly roll back SUV production. Meanwhile, used SUVs would sit on the lots, rusting, no threat to anyone.

